Supreme Court, U. S.
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APPENDIX

VOLUME 1

IN THE

Supreme Court of the United States

October Term, 1976.

Nos. 75-1870, 75-1872.

No. 75-1870.

E. I. du PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR CERTIORARI IN NO. 75-1870 FILED JUNE 25, 1976.

PETITION FOR CERTIORARI IN NO. 75-1872 FILED JUNE 26, 1976.

CERTIORARI GRANTED OCTOBER 4, 1976.

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Appendix.

RELEVANT DOCKET ENTRIES

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for Review of Order of SEC
Case No. 75-1100

RICHARD J. COLLINS, JR.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Feb. 7, 1975. Docketing case.

Feb. 7, 1975. Petition for Review of order of SEC. (Exhibit which petitioner wants called to the attention of the Court.)

Mar. 10, 1975. Motion Christiana Securities Co. for leave to intervene.

Mar. 10, 1975. Motion E. I. du Pont de Nemours and Company for leave to intervene.

Mar. 13, 1975. Order: Christiana Securities Co. & E. I. du Pont de Nemours & Co., permitted to intervene.

May 2, 1975. Case consolidated w/75-1262, 75-1263; counsel for petitioners in cases 75-1262 and 75-1263 may have thru May 28 to serve and file briefs;

counsel for respondent and intervenor-respondents may have thru June 30 to serve and file, under one cover, answer briefs to briefs filed by the various petitioners; appendix deferred; court will expect one consolidated appendix in these three cases.

Sept. 8, 1975. Copies of decisions of SEC cited in ans brief received and forwarded to panel (Heaney, Stephenson, Smith) w/75-1262 and 75-1263.

Sept. 10, 1975. Received from SEC copy of Du Pont's Exh. No. 4 admitted in evidence at proceedings on 2/7/73, before SEC; copy of applicants' Joint Exhibit #4 at proceedings on 2/9/73 before SEC; received originals of proceedings before SEC in Christiana Sec. Co., et al., on Feb. 5, 6 and 7, 1973; received originals of proceedings Feb. 8, 9, 12 and 13 and July 23, 1973, Christiana Securities Co., et al., (5 volumes) w/75-1262 and 75-1263.

Sept. 10, 1975. Argued & submitted w/75-1262 & 75-1263 before Judges Heaney, Stephenson & Smith; For Petitioner, Richard J. Collins, Jr., Lewis C. Murtaugh; For intervenor Du Pont, Daniel Gribbon; For respondent SEC; David Ferber; For intervenor Christiana, Matthew J. Broderick; Conclusion by Messrs. Murtaugh & Collins; Recorded (Within five days parties to file briefs regarding Special Master appointment; District Court requested relevant cases.)

Oct. 9, 1975. Order: Professor Roger Upson, Assoc. Dean of U. of Minnesota College of Bus. Admin. has been appointed by this court as a contract consultant in the office of the Circuit Exec. to assist in understanding record made by SEC, etc., with 75-1262 and 75-1263.

Dec. 12, 1975. Professor Roger B. Upson's report on questions asked by the Court, with 75-1262/1263.

Dec. 29, 1975. Received copy of opinion by Judge Schwartz sent to panel by counsel, with 75-1262/1263.

Jan. 23, 1976. Opinion by Judge Heaney; dissenting opinion by Judge Stephenson.

Jan. 23, 1976. Judgment: The order of the Commission granting the application to merge is set aside; costs will be taxed equally to Du Pont and Christiana in accordance with majority opinion.

Feb. 13, 1976. Petition of respondent for rehearing en banc and rehearing with 75-1262 & 75-1263.

Feb. 26, 1976. Order: Respondent's and intervenors' petitions for rehearing with suggestions for rehearing en banc are denied by an equally divided court.

Mar. 8, 1976. Certified copies of judgment forwarded to counsel. (with 75-1262 & 75-1263).

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for Review of an order of the SEC
Case No. 75-1262

LEWIS C. MURTAUGH, TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56,

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent

E. I. du PONT de NEMOURS AND COMPANY,

Intervenor

CHRISTIANA SECURITIES COMPANY,

Intervenor.

1975—7th Circuit.

Feb. 10, 1975. Filed O&3c of a petition for review of an order of the Securities and Exchange Commission—svc.

Mar. 10, 1975. Filed O&3c of motion of Du Pont for leave to intervene—svc.

Mar. 11, 1975. Filed O&3c of motion of Christiana Securities Company for leave to intervene—svc.

Mar. 12, 1975. Entered order granting motion of 3/11/75.

Mar. 14, 1975. Entered order granting motion of 3/10/75.

Mar. 26, 1975. Filed O&3c of respondent's suggestion with respect to transfer proceedings—svc. (75-1236)

Apr. 9, 1975. Entered order transferring to the eighth circuit. (75-1236) Sub. 3/28/75.

1975—8th Circuit

Apr. 18, 1975. Docketing case.

May 2, 1975. Cases consolidated; counsel for petitioners in cases 75-1262 and 75-1263 may have thru May 28 to serve and file briefs; counsel for respondent and intervenor-respondents may have thru June 30 to serve and file, under one cover, answer briefs to briefs filed by the various petitioners; appendix deferred; court will expect one consolidated appendix in these three cases w/75-1100.

Sept. 10, 1975. Argued and submitted w/75-1100 and 75-1263 before Judges Heaney, Stephenson & Smith; For petitioner, Richard J. Collins, Jr., Lewis C. Murtaugh; For intervenor Du Pont, Daniel Gribbon; For respondent SEC, David Ferber; For intervenor Christiana, Matthew J. Broderick; Conclusion by Messrs. Murtaugh & Collins; Recorded (Within 5 days parties to file briefs regarding Special Master appointment; District Court requested relevant cases).

Oct. 9, 1975. Order: Professor Roger Upson, Assoc. Dean of U. of Minnesota College of Bus. Admin. has been appointed by this court as a contract consultant in the office of the Circuit Exec. to assist in understanding record made by SEC, etc. w/75-1100.

Dec. 12, 1975. Professor Roger B. Upson's report on questions asked by the Court, with 75-1100/1263.

Dec. 29, 1975. Received copy of opinion by Judge Schwartz, sent to panel by counsel, with 75-1000/1263.

Jan. 23, 1976. Opinion by Judge Heaney; dissenting opinion by Judge Stephenson w/75-1100.

Jan. 23, 1976. Judgment: The order of the Commission granting the application to merge is set aside; costs will be taxed equally to Du Pont and Christiana in accordance with majority opinion w/75-1100.

Feb. 6, 1976. Petition of Intervenors, E. I. du Pont de Nemours and Co. and Christiana Securities Company, for rehearing en banc and rehearing.

Feb. 13, 1976. Petition of respondent for rehearing en banc and rehearing with 75-1100 & 75-1263.

Feb. 26, 1976. Order: Respondent's and intervenors' petitions for rehearing with suggestions for rehearing en banc are denied by an equally divided court w/1100.

Mar. 8, 1976. Certified copies of judgment forwarded to counsel. (with 75-1100 and 75-1262).

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—

Petition for Review of an order of the SEC

Case No. 75-1263

—

LEWIS C. MURTAUGH, TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56,

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

1975—7th Circuit.

Mar. 18, 1975. Filed O&3c of a petition for review of an order of the Securities and Exchange Commission—svc.

Mar. 18, 1975. Filed Clerk's copy of notice of service on counsel for respondent.

Mar. 26, 1975. Filed O&3c of respondent's suggestion with respect to transfer of proceedings—svc. (75-1131).

Apr. 9, 1975. Entered order transferring to eighth circuit (75-1131). Sub. 3/28/75.

1975—8th Circuit.

Apr. 18, 1975. Docketing case.

May 2, 1975. Order: Cases consolidated; counsel for petitioners in cases 75-1262 and 75-1263 may have thru May 28 to serve and file briefs; counsel for respondent and intervenor-respondents may have thru June 30 to serve and file, under one cover, answer briefs to briefs filed by the various petitioners; appendix deferred; court will expect one consolidated appendix in these three cases w/75-1100.

May 13, 1975. Order: Christiana Securities Co. may intervene in this cause; briefing schedule previously established in cases 75-1100, 75-1262 & 75-1263 remains in effect.

Sept. 10, 1975. Argued & submitted w/75-1100 & 75-1262 before Judges Heaney, Stephenson & Smith; For petitioner, Richard J. Collins, Jr., Lewis C. Murtaugh; For intervenor Du Pont, Daniel Gribbon; For respondent SEC, David Ferber; For intervenor Christiana, Matthew J. Broderick; Conclusion by Messrs. Murtaugh & Collins; Recorded (Within 5 days parties to file briefs regarding Special Master appointment; District Court requested relevant cases).

Oct. 9, 1975. Order: Professor Roger Upson, Assoc. Dean of U. of Minnesota College of Bus. Admin. has been appointed by this Court as a contract consultant in the office of the Circuit Exec. to assist in understanding record made by SEC, etc. w/75-1100.

Dec. 12, 1975. Professor Roger B. Upson's report on questions asked by the Court, with 75-1100/1262.

Dec. 29, 1975. Received copy of opinion by Judge Schwartz, sent to panel by counsel, with 75-1100/1262.

Jan. 23, 1976. Opinion by Judge Heaney; dissenting opinion by Judge Stephenson w/75-1100.

Jan. 23, 1976. Judgment: The order of the Commission granting the application to merge is set aside; costs will be taxed equally to Du Pont and Christiana in accordance with majority opinion w/75-1100.

Feb. 13, 1976. Petition of respondent for rehearing en banc and rehearing with 75-1100 & 75-1262.

Feb. 26, 1976. Order: Respondent's and intervenors' petitions for rehearing with suggestions for rehearing en banc are denied by an equally divided court w/1100.

Mar. 8, 1976. Certified copies of judgment forward to counsel (with 75-1100 & 75-1263).

RELEVANT DOCKET ENTRIES BEFORE THE SECURITIES AND EXCHANGE COMMISSION.

Administrative Proceeding Docket
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
No. 3-3928
In The Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware

12-13-72 Notice of and order for hearing on application under Sections 17(b), 17(d), 6(c) and Rule 17d-1 for an order exempting transactions between affiliates pursuant to a merger. Hearing to be held at 10:00 AM on 2-5-73 in Washington, D. C. before a hearing officer to be designated. Requests to be heard due 1-15-73. Mailed 12-13-72 Murtaugh (4711); Collins (4712); Shields (4713); May (4714); Elsant (4715).

12-21-72 Original and 7 copies of Motion to Establish Prehearing Procedures and Notice of Appearance of Counsel for Du Pont, filed by Cyril V. Smith, Jr., Esq. (ctf of sv attached).

1- 3-73 Order of Chief Administrative Law Judge Blair designating Administrative Law Judge Ullman as presiding judge at hearing. Mailed 1-3-73 (804868 thru 804873).

1- 4-73 Original and 7 copies of Request for Leave to be Heard and Participant's Brief, filed by Ernest N. May (Affv. of sv attached).

1- 8-73 Original and 7 copies of Notice of Appearance, filed by Richard S. Seltzer, Esq., Dechert Price & Rhoads, on behalf of applicant Christiana Securities Company (cft of sv attached).

1-11-73 Order of Administrative Law Judge Ullman fixing prehearing procedures. Mailed 1-12-73 (804027 thru 804033).

1-15-73 Orig & 7 copies of Application under Sections 17(b), 17(d), and 6(c) and Rule 17d-1 for an order exempting Transactions between Affiliates pursuant to a Merger, filed by Daniel W. Maher individually and as Chairman of Du Pont Outsider Shareholders (ctf of sv attached).

1-15-73 Orig & 7 copies of Application to be heard in the Proceeding, filed by Richard J. Collins, Jr. (ctf of sv attached).

1-15-73 Notice of Appearance of Richard J. Collins, Jr., on behalf of Mrs. Lee J. Collins (ctf of sv attached).

1-15-73 Orig & 7 copies of Application by Mrs. Lee G. Collins to be heard and Notice of Appearance of Richard J. Collins and Mrs. Lee G. Collins, filed by Richard J. Collins (ctf of sv attached).

1-15-73 Orig & 8 copies of Application, filed by Lewis C. Murtaugh (ctf of sv attached).

1-19-73 Ltr dtd 1-18-73 Ernest N. May, to Administrative Law Judge Ullman, with enclosures.

1-22-73 Orig & 7 copies Motion to Modify order fixing pre-hearing procedures, filed by Lewis C. Murtaugh, trustee (ctf of sv attached).

1-22-73 Orig & 7 copies of Christiana Securities Company's List of Witnesses, Subject Matter of Testimony and List of Proposed Exhibits, filed by Matthew J. Broderick, Esq. (ctf of sv attached).

1-22-73 Orig & 7 copies of Reply of Christiana and Du Pont to Application of Lewis C. Murtaugh to intervene as a party, filed by Daniel M. Gribbon, Esq., and Kenneth W. Gemmill, Esq. (ctf of sv attached).

1-22-73 Orig & 7 copies of List of Witnesses and Statement of the Subject Matter of Their Testimony, filed by Richard J. Collins, Jr., Esq., on behalf of himself and Mrs. Lee G. Collins (ctf of sv attached).

1-26-73 Orig & 7 copies of Reply of Applicants, filed by Peter B. Archie, Esq. (ctf of sv attached).

1-29-73 Div's Memorandum in opposition to the Petition of Lewis C. Murtaugh to intervene as a party, filed by Robert Anderson, Esq.—IM (ctf of sv attached).

1-29-73 Orig & 7 copies of (1) Exhibits and Summary of Testimony to be offered jointly by Christiana and Du Pont, (2) Exhibits and Summaries of Testimony to be offered by Du Pont and ctf of sv attached, filed by Peter B. Archie, Esq.

1-29-73 Christiana Securities Company's summary of the testimony of witnesses and copy of exhibits, filed by Richard S. Seltzer, Esq. (ctf of sv attached) (add'l copies to be sent in) (2-2-73 add'l copies rec'd).

1-29-73 Order of Administrative Law Judge Ullman denying Motions for Intervention and for Modification of Order, and Changing Place of Hearing to Room 776. Mailed 1-31-73 (804325 thru 804358).

1-31-73 Rec'd orig & 7 copies of Rejoinder to reply to motion to modify order filed by Lewis C. Murtaugh, Esq., trustee for Emanuel and Helen Steib under declaration of trust dated 8/30/56 (ctf of sv attached).

2- 5-73 Notice of appearance of Robert E. Anderson on behalf of Division of Investment Management Regulation.

2- 5-73 Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie, Esqs. of Covington & Burling, 888—16th Street, N.W., Washington, D. C. 20006 on behalf of E. I. du Pont de Nemours and Company.

2- 5-73 Notice of appearance of Richard S. Seltzer, Kenneth W. Gemmill and Matthew J. Broderick of Dechert Price & Rhoads, 1600 Three Penn Center, Philadelphia, Penn. 19102 on behalf of Christiana Securities Co.

2- 5-73 Notice of appearance of Lewis C. Murtaugh, Esq., as trustee, 141 W. Jackson St., Chicago, Illinois 60604 on behalf of Emanuel & Helen Steib.

2- 5-73 Notice of appearance of Daniel W. Maher, 1136 Canyon Drive, Upland, California, appearing pro se.

2- 5-73 Notice of appearance of Ernest N. May, Suite 106, Weldin Building, 3411 Silverside Road, Wilmington, Delaware 19810, pro se.

2- 5-73 Notice of appearance of Richard J. Collins, Jr., 314 North Broadway, St. Louis, Missouri 63102 on behalf of himself and Mrs. Lee G. Collins.

2- 6-73 Rec'd orig trans of hearing held 2-5-73 in Washington, D. C. pp. 1 thru 161 Sidney Ullman, Administrative Law Judge. Appearances: Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie on behalf of E. I. du Pont de Nemours & Co., Kenneth W. Gemmill, Matthew J. Broderick and Richard S. Seltzer on behalf of Chistiana Securities Co., Robert Anderson, Gerald Osheroff and Peter Kiernan on behalf of the Division of Investment Management Regulation: Ernest N. May pro se: Richard J. Collins pro se; Daniel W. Maher and Lewis C. Murtaugh on behalf of Du Pont Outsider Shareholders Association. Applicants Exs. (Joint) 3, 1-A thru 1-C, and 5 thru 7 in evid. (Exs. retained) Reporter's notes rec'd.

2-13-73 Rec'd orig trans of hearing held 2-6-73 in Washington, D. C. pp. 162 thru 315 Sidney Ullman, Admin. Law Judge. Appearances heretofore noted. Murtaugh's Exs. 2 & 3 for ident only. Divs Exs. 1, 2a thru 2b, 3 thru 8 rec'd in evid. Div's Ex. 9 withdrawn Du Pont's Ex. 1 rec'd in evid. Du Pont's Ex. 4 for ident only. (Exs. retained) Reporter's notes rec'd.

2-13-73 Rec'd orig trans of hearing held 2-7-73 in Washington, D. C. pp. 316 thru 475 Sidney Ullman, Admin. Law Judge. Appearances

heretofore noted. Du Pont's Exs. 2, 4 and 4a rec'd in evid. Div's Exs. 9, 10 & 11 rec'd in evid. (Exs. retained) Reporter's notes rec'd.

2-14-73 Official Notice of Admin. Law Judge Ullman of: File #812-1367-1 (In the Matter of Delaware Realty and Christiana) Exhibit B to the application; Investment Company Act Release #5847; File #811-366-1 & 2, and particularly Section 5, Amendment #1 to the Christiana Registration Statement; and any application in the files of the Commission filed with respect to any case or proceeding which is cited or argued in the briefs of any party or participant. Mailed 2-20-73 (804750 thru 804757).

2-15-73 Order receiving affidavit in evidence as Collins Exhibit 1A. Mailed 2-16-73 (4680 thru 4684 and Collins order & affd. 4685).

2-16-73 Rec'd orig trans of hearing held 2-9-73 in Washington, D. C. pp. 631 thru 739 Sidney Ullman, Admin. Law Judge. Appearances heretofore noted. Div's Ex. 12 rec'd in evid. Du Pont's Ex. 5 rec'd in evid. Appl's Exs. 2 & 4 rec'd in evid. (Exs. retained) Reporter's notes rec'd.

2-16-73 Rec'd orig trans of hearing held 2-12-73 in Washington, D. C. pp. 740 thru 912 Sidney Ullman, Admin. Law Judge. Appearances heretofore noted. Murtaugh's Exs. 1 thru 7 rec'd in evid. Div's Ex. 13 withdrawn. (Exs. retained) Reporter's notes rec'd.

2-16-73 Rec'd orig trans of hearing held 2-13-73 in Washington, D. C. pp. 913 thru 996 Sidney

Ullman, Admin. Law Judge. Appearances heretofore noted. Christiana's Exs. 4 & 5 for ident only. Murtaugh's Exs. 8, 9, 11 thru 15 rec'd in evid. Murtaugh's Ex. 10 rec'd in evid. Du Pont's Ex. 8 rec'd in evid. (Exs. retained) Reporter's notes rec'd.

2-26-73 Ltr dtd 2-22-73 to Sidney Ullman from Ernest N. May (cc: K. W. Gemmill, P. B. Archie, J. Heneghan, Christiana Securities Company, L. E. Grimes and C. E. Welch) calling his attention to the testimony of Messrs. McCoy and Shapiro and commenting on the control of Du Pont Company Management. 3-7-73 copy of letter together with Judge Ullman's order of 3-6-73 sent to R. Collins, L. Murtaugh and D. Maher.

3- 6-73 Order of Administrative Law Judge Ullman making a ltr dtd 2-22-73 from Ernest N. May to the undersigned a part of the record in the proceedings. Mailed 3-7-73 (804027 thru 804032).

3-15-73 Rec'd orig trans of hearing held 2-8-73 in Washington, D. C. pp. 476 thru 630 Sidney Ullman, Administrative Law Judge. Appearances heretofore noted. Christiana's Exs. 1 thru 3 rec'd in evid. Du Pont's Ex. 5 for ident only. Collins Ex. 1 rec'd in evid. Div's Ex. 12 for ident only. (Exs. retained) Reporter's notes rec'd.

3-19-73 Orig & 7 copies of Brief of Christiana Securities Co., in Support, filed by Richard S. Seltzer, Esq. (ctf of sv attached).

3-19-73 Orig & 7 copies of Brief of E. I. du Pont de Nemours and Company in support of Applicant's proposed findings and conclusions, filed by Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie and applicants' joint proposed findings and conclusions filed by Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie on behalf of E. I. du Pont de Nemours and Company, and Kenneth W. Gemmill, Matthew J. Broderick, Stephen R. Miller and Richard S. Seltzer on behalf of Christiana Securities Company (ctf of sv attached).

4- 9-73 Orig & 7 copies of Brief of participant Richard J. Collins, Jr., filed by Richard J. Collins on behalf of himself (ctf of sv attached).

4-11-73 Stipulation as to correction of transcript of hearing, executed by Gerald Osheroff and Robert E. Anderson of Division of Investment Management Regulation; Kenneth W. Gemmill, Stephen R. Miller, Matthew J. Broderick and Richard S. Seltzer on behalf of Christiana Securities Company; Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie on behalf of E. I. du Pont de Nemours and Company.

4-16-73 Order of Admin. Law Judge Ullman correcting the transcript in accordance with the proposed corrections set forth in Appendix A attached to the aforementioned stipulation on 4-11-73. Mailed 4-18-73 (804776 thru 804783).

4-20-73 Orig & 7 copies of Brief of Participant Daniel W. Maher, filed by Daniel W. Maher (ctf of sv attached).

4-23-73 Orig & 7 copies of Div's PFC&B, filed by Robert E. Anderson, Esq.-IMR (ctf of sv attached).

4-23-73 Orig & 7 copies of Brief of Lewis C. Murtaugh Trustee for Emanuel and Helen Steib under Declaration of Trust dtd 8-30-56, filed by Lewis C. Murtaugh, Esq. (ctf of sv attached).

4-24-73 Rec'd Div's Exs. 1 thru 12, Applicant's Joint Exs. 1-A thru 1-C, 2 thru 7, Du Pont Exs. 1 thru 4, 4-A, 5, Collins Ex. 1 and Christiana Exs. 1 thru 5, Murtaugh Exs. 1 thru 15. (Ex. files 1 and 2) 3-3928-1 3-3928-1.

4-30-73 Orig & 7 copies of Motion for Oral Argument and Leave to Participate therein, filed by Lewis C. Murtaugh, Esq. (ctf of sv attached).

5-11-73 Ex-parte Communication: Ltr dtd 5-10-73 from Ernest May, to Chairman Cook. (*PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION*).

5-16-73 Orig & 7 copies of the "Reply Brief of E. I. du Pont de Nemours and Company," filed by Peter B. Archie, Esq. (ctf of sv attached).

5-16-73 Orig & 7 copies of the Reply Brief of Christiana Securities Company, filed by Richard S. Seltzer, Esq. (ctf of sv attached).

5-22-73 Ex-Parte Communication: Ltr dtd 5-21-73 from Ernest May, to Commissioner Owens, enclosing copy of letter sent to Chairman Cook. (*PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION*).

5-24-73 Ltr to Ernest N. May regarding Ex-parte Communication and informing that copies will be served on all parties. (*PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION*) Mailed 5-29-73 (804565 thru 804572).

6-13-73 Order scheduling oral argument for 10:00 AM on 7-23-73. If any of the other parties or participants in this proceeding wish to participate in the oral argument, it is requested that they so notify the Secretary of the Commission in writing not later than the close of business on 6-27-73. Mailed 6-14-73 (804844 thru 804851).

6-15-73 Rec'd copy of Complaint filed 6-12-73 re Joan M. Harriman, et al v. E. I. du Pont de Nemours and Company, et al. 73 C 1504-U. S. D. Ct. N. D. of Illinois E. D. HELD in the United States District Court for the Northern District of Illinois Eastern Division.

6-22-73 Orig & 7 copies of Application to Participate in the Oral Argument, filed by Richard J. Collins, Jr. (ctf of sv attached) .

6-22-73 Div's Notice not to participate in the opening oral argument if the Commission will allot the Div 10 minutes to respond to the arguments of the applicants and intervenors, filed by Gerald Osheroff, Esq.,-IMR (ctf of sv attached).

6-25-73 Orig & 7 copies of Request of E. I. du Pont de Nemours and Company to Participate in Oral Argument, filed by Daniel M. Gribbon, Esq. (ctf of sv attached).

6-26-73 Ltr dtd 6-25-73 from Richard S. Seltzer, Esq., advising that the Christiana Securities Company wishes to participate in the oral argument (cc: Parties).

6-26-73 Statement of Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib that he wishes to participate in the oral argument (ctf of sv attached).

7- 2-73 Order fixing time in oral argument: Lewis C. Murtaugh—15 minutes, Richard J. Collins—15 minutes, Counsel for E. I. du Pont de Nemours —15 minutes, Counsel for Christiana Securities Company—15 minutes, and Counsel for the Division of Investment Management Regulation—10 minutes. Mailed 7-3-73 (804217 thru 804222) Mailed 7-12-73 (804394 & 804395).

7- 9-73 Ltr dtd 7-5-73 from Richard J. Collins, Esq. asking where the oral argument will be heard. (cc: Parties).

7-23-73 Minute Memo: The Commission heard oral argument and the matter was taken under advisement.

7-30-73 Rec'd orig trans of oral argument held 7-23-73 in Washington, D. C. pp. 1 thru 41 Commrs: Hugh F. Owens (Acting Chairman, Presiding), Philip A. Loomis, Jr. & John R. Evans. Appearances: Lewis C. Murtaugh, on behalf of Trustee for Emanuel & Helen Steib. Richard J. Collins, on behalf of himself and Mrs. Lee G. Collins. Daniel M. Gribbon, on behalf of E. I. du Pont de Nemours and Company. Matthew S. Broderick, on behalf of Christiana Securities

Company. Gerald Osheroff, on behalf of Enforcement Div. SEC. Joint Ex. 8 file with trans. (Ex. rec'd) Reporter's notes rec'd.

1- 7-74 (Rec'd 1-20-75 in APS) Ltr to Chairman Garrett, Jr. from Daniel M. Gribbon encl. copy of amendment to agreement and plan of reorganization between E. I. du Pont de Nemours and Company and Christiana Securities Company.

1- 8-74 Ex-Parte Communication dtd 1-7-74 from Ernest N. May (cc: Parties) *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION).*

1-11-74 Ltr to Ernest N. May regarding above ex-parte communication. Mailed 1-15-74 (804331 thru 804337) Reg. No. 811859 *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION).*

10- 8-74 Ex-Parte Communication dtd 10-7-74 from Ernest N. May. *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION)* CPY TO PARTIES 10-16-74.

10-11-74 Ltr to Ernest N. May regarding above ex-parte communication. Mailed 10-16-74 (804376 thru 804383) *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION).*

12-13-74 Findings and opinion and order granting application. Mailed 12-17-74 (804814 thru 804817 and 804954 thru 804957).

12-23-74 Petition of Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib, for rehearing in-

cluding a motion for leave to adduce additional evidence, and for further time in connection therewith.

12-26-74 Extension order granting Lewis C. Murtaugh until 1-20-75 to file his petition for rehearing and for leave to adduce additional evidence. Mailed 12-30-74 (804940 thru 804947).

12-30-74 Petition of Richard J. Collins, Jr., for a rehearing (ctf of sv attached).

12-30-74 Ltr dtd 12-27-74 from Richard S. Seltzer changing his firm's address to: 3400 Centre Square West, 1500 Market Street, Philadelphia, Pennsylvania 19102, phone 215-972-3400.

12-30-74 Reply of Christiana and Du Pont to petitions of Lewis C. Murtaugh and Richard J. Collins, filed by Daniel M. Gribbon, Cyril V. Smith, Jr., Peter B. Archie and Richard S. Seltzer.

1- 2-75 Answer of the Div. of Investment Management Regulation to petitions of Richard J. Collins, Jr., and Lewis C. Murtaugh, filed by Gerald Osheroff (ctf of sv attached).

1- 6-75 Memorandum of Richard J. Collins, Jr., concerning the opinion of the SEC dated 12-13-74 (ctf of sv attached).

1-20-75 Supplemental petition of Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib under declaration of trust dtd 8-30-56 for rehearing including a motion for leave to adduce additional evidence (ctf of sv attached).

2- 3-75 Reply of Du Pont and Christiana to supplemental position of Lewis C. Murtaugh, filed by

Daniel M. Gribbon and Kenneth W. Gemmill (ctf of sv attached).

2- 6-75 Answer of the Div. of Investment Management Regulation to petition of Lewis C. Murtaugh for rehearing and for leave to adduce additional evidence filed by Gerald Osheroff (ctf of sv attached).

2-27-75 Memorandum opinion and order denying rehearing and leave to adduce additional evidence. Mailed 3-3-75 (804311 thru 804318).

(Investment Company Act Release No. 7402)

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Administrative Proceeding File No. 3-3928

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UNITED STATES OF AMERICA

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
OCTOBER 3, 1972

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. du PONT de NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)

Investment Company Act of 1940

—

NOTICE OF FILING OF APPLICATION UNDER SECTIONS 17(b), 17(d) AND 6(c) AND RULE 17d-1 FOR AN ORDER EXEMPTING TRANSACTIONS BETWEEN AFFILIATES INCIDENT TO A MERGER.

NOTICE IS HEREBY GIVEN that Christiana Securities Company ("Christiana"), a Delaware corporation, registered under the Investment Company Act of 1940 ("Act") as a closed-end non-diversified management investment company, and E. I. du Pont de Nemours and Company ("DuPont"), a Delaware corporation (hereinafter collectively referred to as "Applicants"), have filed a joint application pursuant to Sections 6(c), 17(b) and 17(d) of the Act and Rule 17d-1 thereunder, for an order exempting from the provisions of 17(a) and permitting

under Section 17(d) and Rule 17d-1 certain transactions incident to a proposed merger of Christiana into DuPont, with DuPont as the surviving corporation. All interested persons are referred to the application on file with the Commission for a statement of the representations therein, which are summarized below.

Christiana owns approximately 28.3% of the outstanding common stock of DuPont. Accordingly, Christiana presumptively controls DuPont within the meaning of Section 2(a)(9) of the Act, and the companies are affiliated persons as defined in Section 2(a)(3) of the Act. Moreover, certain directors, officers and other affiliated persons of Applicants are stockholders of Christiana or DuPont or both companies.

Christiana has outstanding 106,500 shares of 7% cumulative preferred stock, having a liquidation value of $100 per share and a redemption price of $120 per share, and 11,710,103 shares of common stock. Christiana's common stock is traded in the over-the-counter market in only limited quantities, and its market price consistently has been less than the market value of Christiana's underlying assets, generally ranging from 20% to 25% less during the two years preceding public announcement of a possible merger. There are approximately 6,683 holders of Christiana common stock and 1,516 holders of the preferred stock. Christiana's assets consist of cash and securities, of which the most important holding is 13,417,120 shares (28.28%) of the outstanding common stock of DuPont. The value of the total security holdings of Christiana as of July 17, 1972, based primarily on market values, was $2,226,814,066, of which 98.7% was represented by its holdings of common stock of DuPont. The remaining security holdings of Christiana consist primarily of 16,256 (.96%) shares of the $4.50 preferred stock of DuPont, 69,216 (3.45%) shares of the common stock of

Wilmington Trust Company ("Wilmington") and all of the outstanding shares of the News Journal Company ("News Journal"). The total value of $2,226,814,066 for the security holdings of Christiana is based on the average closing prices on the New York Stock Exchange on July 10 through 14, 1972 for the DuPont common and preferred stock ($2,199,854,642); the average closing bid prices in the over-the-counter market on July 10 through July 14, 1972, for the Wilmington common stock ($2,699,424); and the fair market value of the News Journal common stock based upon an appraisal as of July 17, 1972 ($24,260,000). Christiana also has other assets consisting, at June 30, 1972, of (1) cash and cash equivalents, less current liabilities, in the net amount of $5,981,367 and (2) a claim for refund of Federal income taxes and interest, carried on the books as a deferred charge in the amount of $11,723,013.

Christiana's net asset value has been adjusted as follows for purposes of the proposed merger:

Total Net Asset Value of Christiana (as above)	$2,244,518,446
Less Adjustments:	
Adjustment to reflect tax claim at no value	11,723,013
Distribution cost for Wilmington Trust (3% of market value)	80,983
Capital gains tax @ 30% on sale of:	
Wilmington Trust (tax basis = $903,592)	514,455
News-Journal (tax basis = $846,107)	7,024,168
Merger expenses (50% of estimated total expenses)	750,000
Cash reserved for tax claim expenses	1,000,000
Adjusted Net Asset Value of Christiana	$2,223,425,827

Under the plan of merger, the tax claim, together with $1,000,000 of Christiana's cash to be reserved to cover expenses to pursue the claim, will be treated at the time of the merger as having no value. The tax claim and related cash reserved for expenses will become the property of DuPont on the effective date of the merger, and if upon settlement of the tax claim any proceeds are realized they will be distributed to the former Christiana shareholders as described below. The expenses of the merger are to be shared equally. Accordingly, the net asset value of Christiana's cash and cash equivalents has been adjusted to reflect both the reservation of the $1,000,000 related to the tax claim and $750,000 related to merger expenses. The application also states that DuPont intends to hold the Wilmington and News-Journal stock for only the period required for the orderly disposition thereof. Accordingly, the net asset values of these holdings have been adjusted to reflect the estimated expenses of disposition and a tax of 30% on the capital gains which would result from their sale at the values reflected for such assets.

DuPont has outstanding 1,688,850 shares of $4.50 Series cumulative preferred stock without par value, 700,000 shares of $3.50 Series cumulative preferred stock without par value, and 47,566,694 shares of common stock held by approximately 224,964 shareholders.

Under the proposed plan of merger, the outstanding common stock of Christiana will be converted into DuPont common stock at the rate of one share of Christiana common stock for each 1.123 shares of DuPont common stock. For the purpose of computing this conversion ratio, Christiana was valued at 97½% of the adjusted value of its net assets, as described below, and the DuPont common stock to be issued to the Christiana common stockholders was valued at $163.875 a share, the average closing market price for DuPont common stock on the New York Stock

Exchange on the five trading days immediately preceding July 17, 1972, the date on which the proposed merger plan was approved in principle by Christiana and DuPont's Boards of Directors. The number of additional shares of DuPont common stock, if any, to be distributed to the former Christiana common stockholders upon settlement of the tax claim will be determined by converting any net proceeds from the settlement, along with any residue of funds reserved for payment of expenses of pursuing the tax claim, into DuPont common stock having corresponding value and such shares will be delivered to an agent appointed for such purpose. The agent will distribute such additional shares of DuPont common stock pro rata to the former Christiana common stockholders in proportion to the DuPont common stock received by them in the merger transaction. The price for DuPont common stock to be used for the foregoing conversion will be the average of the closing prices for DuPont common on the New York Stock Exchange for the ten trading days preceding the date on which refund payment by the Government is received by DuPont or, if no refund is to be received, the date on which judgment to that effect becomes final.

On the effective date of the merger the Christiana preferred stock will be converted into DuPont common stock having a current market value equal to $120 per preferred share, the preferred call price. The DuPont common stock to be exchanged for such preferred stock will be valued at the average of the closing prices for the common stock on the New York Stock Exchange for the ten trading days preceding the effective date of the merger. The conversion rate was estimated at .7323 shares of DuPont common stock for one share of Christiana preferred stock, based on the current average price for DuPont common stock on July 17, 1972.

The shares of DuPont common stock used for the merger will be newly issued shares. All common and preferred stock of DuPont owned by Christiana will be retired in the merger. All other shares of DuPont will remain outstanding. DuPont will not issue fractional shares to the stockholders of Christiana. Instead, such stockholders having a fractional interest in a share of DuPont common stock will be provided an opportunity, through an agent appointed for such purpose, to (1) sell such interest or (2) purchase the additional fractional interest required to make up one full share.

Under Delaware Corporation Law, after approval of the agreement of merger by the respective boards of directors of Christiana and DuPont, the affirmative vote of the holders of a majority of the total outstanding shares of common stock of each company will be required. Christiana and DuPont will arrange for special meetings of their stockholders, after obtaining the requested exemption order, for stockholder vote on the merger proposal, such vote to be subject to receipt of a Ruling from the Internal Revenue Service that the proposed merger may be consummated on a tax-free basis. Under Delaware Corporation Law, any holder of Christiana's preferred stock who objects in writing within the prescribed time may receive a cash payment equal to the appraised value of his preferred stock. No such right is available with respect to any Christiana common shares or to any DuPont common or preferred shares.

The proposed plan of merger and the method of determining the conversion ratios were developed on the basis of independent financial studies made by three investment banking firms acting as financial advisors. The investment banking firms were engaged by special committees of the Boards of Christiana and DuPont, which had been ap-

pointed to negotiate and submit recommendations with respect to the proposed merger. In the case of each company, the Special Board Committee consisted of two directors with no director, officer or employee relationship with the other company. Independent studies and recommendations regarding a suitable range of merger terms were prepared by Morgan Stanley and Company, to advise both Christiana and DuPont; Kidder, Peabody and Company, Inc., to advise Christiana separately; and First Boston Corporation to advise DuPont separately. Negotiations by the Special Board Committees were conducted with due consideration of the recommendations made by the financial advisors regarding ranges of merger terms they would consider fair and reasonable, and resulted in proposals by the Special Board Committees for a merger with terms thereof based on 97½% of Christiana's adjusted net asset value, that is, a discount of 2½%. However, the effective rate of discount is approximately 1.8% to the Christiana shareholders when effect is given to their recapture of approximately 28% by reason of becoming shareholders of DuPont. The DuPont Special Board Committee considered merger terms reflecting the proposed discount of Christiana's adjusted net asset value fair and reasonable for all parties affected, and appropriate in the circumstances to provide sound business reasons for DuPont to undertake the merger and the disposition of those securities acquired in the merger which DuPont does not wish to retain. The Christiana Special Board Committee considered the terms fair and reasonable for all concerned in the light of significant benefits in the merger to the Christiana common stockholders in acquiring a more readily marketable security, elimination of the sizable market discount from net asset value which has prevailed on the Christiana stock prior to the merger announcement, and

the elimination of the Federal income tax payable by Christiana at the currently effective rate of 7.2% on dividends received on the DuPont common stock. As to the Christiana preferred stockholders, the application states that the market value of their holdings will increase to the amount at which they could have been redeemed.

Applicants state they are requesting a ruling from the Internal Revenue Service to the effect that no gain or loss for Federal income tax purposes will be recognized to either DuPont or Christiana or to their stockholders as a result of the merger except with respect to (1) cash received by any Christiana stockholder in connection with his disposition of an interest in a fractional share of DuPont common stock, (2) cash received by any dissenting preferred stockholder of Christiana who elects appraisal rights and (3) certain portions of any contingent distribution in connection with the tax claim.

The proposed discount as a basis for the merger falls within the range recommended by each of the financial advisors, and each has expressed the opinion that the resultant merger terms are fair and reasonable for all parties affected.

Section 17(a) of the Act prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling to or purchasing from such registered company or any company controlled by such registered company, any security or other property, subject to certain exceptions, unless the Commission upon application pursuant to Section 17(b) grants an exemption from the provisions of Section 17(a), after finding that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policy of the

registered investment company, as recited in its registration statement and reports filed under the Act, and is consistent with the general purposes of the Act. Section 17(d) of the Act and Rule 17d-1 thereunder, taken together, provide among other things, that it shall be unlawful for any affiliated person, acting as principal, to participate in, or effect any transaction in connection with any joint enterprise or arrangement in which any such registered company, or a company controlled by such registered company, is a participant unless an application regarding such arrangement has been granted by an order of the Commission. Section 6(c) of the Act provides that the Commission may conditionally or unconditionally exempt any transaction or class of transaction from any provision of the Act if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

NOTICE IS FURTHER GIVEN that any interested person may, no later than October 27, 1972, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request and the issues of fact or law proposed to be controverted, or he may request that he be notified if the Commission should order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D. C. 20549. A copy of such request shall be served personally or by mail (air mail if the person being served is located more than 500 miles from the point of mailing) upon Applicants at the address stated above. Proof of such service (by affidavit or in case of an attorney at law by certificate) shall be filed contemporaneously with the request. At any time after said date, as

provided by Rule 0-5 of the Rules and Regulations promulgated under the Act an order disposing of the application herein may be issued by the Commission upon the basis of the information stated in said application, unless an order for hearing upon said application shall be issued upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission, by the Division of Investment Company Regulation, pursuant to delegated authority.

Ronald F. Hunt,
Secretary.

(Investment Company Act Release No. 7563)

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Administrative Proceeding File No. 3-3928

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 13, 1972

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)

Investment Company Act of 1940

—

NOTICE OF AND ORDER FOR HEARING ON APPLICATION UNDER SECTIONS 17(b), 17(d), AND 6(c) AND RULE 17d-1 FOR AN ORDER EXEMPTING TRANSACTIONS BETWEEN AFFILIATES PURSUANT TO A MERGER

—

Christiana Securities Company ("Christiana"), a Delaware corporation registered under the Investment Company Act of 1940 ("Act"), and E. I. du Pont de Nemours and Company ("Du Pont"), a Delaware corporation (hereinafter collectively referred to as "Applicants"), have filed a joint application pursuant to Sections 6(c), 17(b), and 17(d) of the Act and Rule 17d-1 thereunder for an order exempting from the provisions of 17(a), and permitting under Section 17(d) and Rule 17d-1, certain transactions incident to a proposed merger of Christiana into Du Pont, with Du Pont as the surviving corporation.

The Commission, on October 3, 1972, issued a notice of the filing of said application (Investment Company Act Release No. 7402). The notice, which is incorporated herein by reference, gave interested persons an opportunity to request a hearing and stated that an order disposing of the application might be issued upon the basis of the information stated therein, unless a hearing should be ordered.

Certain interested persons have filed requests for a hearing. It appears to the Commission that it is appropriate in the public interest and in the interest of investors that a hearing be held with respect to said application.

IT IS ORDERED, pursuant to Section 40(a) of the Act, that a hearing on the aforesaid application under the applicable provisions of the Act and of the rules of the Commission thereunder be held on February 5, 1973 at 10:00 a.m., in the offices of the Securities and Exchange Commission, 1100 L Street, N. W., Washington, D. C. 20005. At such time, the Hearing Room Clerk will advise as to the room in which such hearing will be held. Any person desiring to be heard or otherwise wishing to participate in the proceeding is directed to file with the Secretary of the Commission his application as provided by Rule 9(c) of the Commission's Rules of Practice, on or before January 15, 1973 setting forth any issues of law or fact which he desires to controvert, or any additional issues which he deems raised by this Notice and Order or by such application. Persons filing an application to participate or be heard will receive notice of any adjournment of the hearing as well as other actions of the Commission involving the subject matter of these proceedings.

IT IS FURTHER ORDERED that any officer or officers of the Commission designated by it for that purpose shall preside at said hearing. The officer so designated is hereby

authorized to exercise all the powers granted to the Commission under Sections 41 and 42(b) of the Act and to an Administrative Law Judge under the Commission's Rules of Practice.

The Division of Investment Company Regulation has advised the Commission that it has made a preliminary examination of the application and that upon the basis thereof the following matters and questions are presented for consideration without prejudice to its specifying additional matters and questions upon further examination:

(1) Whether the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

(2) Whether the proposed transactions are consistent with the policy of Christiana, as recited in its registration statement and reports filed under the Act;

(3) Whether the proposed transactions are consistent with the general purposes of the Act;

(4) Whether the participation of Du Pont and Christiana in such transactions on the basis proposed is consistent with the provisions, policies and purposes of the Act, and the extent to which the participation of Du Pont or Christiana is on a basis different from, or less advantageous than, that of other participants; and

(5) Whether the terms of the proposed transactions reflect a disproportionate weight given to either the market value or the net asset value of Christiana securities.

IT IS FURTHER ORDERED that at the aforesaid hearing, attention should be given to the foregoing matters.

IT IS FURTHER ORDERED that the Secretary of the Commission shall give notice of the aforesaid hearing by mailing a copy of this Notice and Order by registered mail to the Applicants and to the persons who have requested a hearing; that notice to all other persons be given by publication of this Notice and Order in the Federal Register; and that a general release of this Commission in respect of this Notice and Order be distributed to the press and mailed to the mailing list for releases.

By the Commission.

Ronald F. Hunt,
Secretary.

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

INVESTMENT COMPANY ACT OF 1940
Rel. No. 8016/December 13, 1974
Admin. Proc. File No. 3-3928

In the Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)

FINDINGS AND OPINION OF THE COMMISSION.

MERGER OF A REGISTERED INVESTMENT COMPANY INTO ITS AFFILIATE

Mergers Generally—Applicable Standards—Disparity in Benefits—Historical Factors

Where registered closed-end investment company and affiliated operating company made joint application under Investment Company Act for exemption from statutory prohibition so as to permit proposed merger of investment company into affiliated company, *held*, the terms of the proposed merger, including exchange ratio based on underlying net asset value of investment company rather than aggregate market price of its own shares, are reasonable and fair and do not involve overreaching, and are consistent with the Act's general purposes. Exemption *granted*.

Where registered closed-end investment company formed in 1915, a quarter of a century prior to the enactment of the Investment Company Act, for the sole purpose of controlling an industrial company, whose securities were its only asset of any consequence, wished to merge into such industrial company and where, because of tax factors and other reasons benefits to investment company were greater than those to industrial company, *held*, imbalance of benefit does not render transaction inherently unfair; some transactions are more important to one side than to the other.

Where functionless investment company sought to merge into its affiliated portfolio company, *held*, public policy against the perpetuation of unnecessary entities makes it inappropriate for the Commission to insist on terms likely to result in investment company's continued existence.

Intrinsic Investment Values versus Market Prices

Intrinsic investment values, *held*, controlling in assessing fairness of proposed merger of closed-end investment company into portfolio company. Contention that hypothetical adverse market impact of merger of closed-end investment company into its affiliated portfolio company should be given great weight in assessing fairness of merger proposal, *rejected*, just result could be attained on basis of investment company's net asset value without conjectural assessment of market impact.

Restraints on the Power of Alienation

Proposal by objecting stockholders for restraints on the alienability of marketable securities to be issued pursuant to proposed merger on ground that unrestricted sales of such securities would lower the market price of

the objectors' shares, *rejected,* as unnecessary under the circumstances.

Taxation

Where registered investment company's managers' decision to merge it into its affiliated portfolio company was motivated by tax factors which led them to prefer a merger that would require the Commission's approval under the Act to a liquidation that would give investment company's shareholders the net asset value of their holdings but impose substantial and uncertain tax liabilities on them, *held,* Act's "reasonable and fair" standard does not entitle portfolio company's shareholders to the benefit of the taxes that the United States would otherwise have collected.

Dissolution of Registered Investment Company

Merger of registered investment company into its affiliated portfolio company that would eliminate duplicative operating expenses and taxation, *held,* consistent with Investment Company Act's purposes. Finding of consistency with investment company's purposes under Section 17(b)(2) of the Act, *not required,* where company's existence is to be terminated.

PRACTICE AND PROCEDURE

Asserted Inadequacy of the Record
Request for Remand
Pre-Trial Discovery
Depositions
Due Process
Rules of Practice

Objecting security holders' request for remand to supplement assertedly inadequate record, *denied,* because

matters into which they wished to inquire irrelevant under governing legal principles.

Hearing officer's denial of requests for depositions, *affirmed,* where Commission's rules made no provision for such depositions.

Due Process does not require depositions.

APPEARANCES:

Kenneth W. Gemmill, Matthew J. Broderick, Stephen R. Miller and *Richard S. Seltzer,* of Dechert Price & Rhoads, for Christiana Securities Company.

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I.

This case involves one of the world's greatest industrial complexes. It is here under the Investment Company Act of 1940. Its origins, however, go back to 1915.

At that time T. Coleman du Pont [1] was the largest single stockholder of E. I. du Pont de Nemours and Company ("Du Pont").[2] He wished to dispose of that interest. To keep Coleman's large block of stock within the family thus assuring its continued control of the enterprise, Cole-

1. The du Pont family spells its name with a lower-case "d."

2. In this opinion the company's name is hereinafter spelled with an upper-case "D."

man's cousin Pierre joined with others to form a holding company.[3] That was Christiana Securities Company.[4] It began life with the substantial amount of Du Pont stock acquired from Coleman plus other blocks of that security contributed by Pierre and by other family members in exchange for Christiana shares.[5] Thus Christiana was organized by members of the du Pont family for the service of their own interests. Through Christiana, the family's dominant faction made sure that its massive holdings in Du Pont would be voted as a block.[6] Christiana was a control device. Historians friendly to Pierre and to the family point out that:

> "[I]t was as chairman of the Christiana Securities Company that his power was most explicitly defined. His immediate family held over 60% of Christiana common stock, and Christiana in turn held over 30% of the Du Pont common stock outstanding (through Delaware Realty[7] and personal holdings the share held by Pierre's family in Du Pont was even higher). Since the Du Pont Company still owned close to 35%

3. With one exception, all of the people involved were members of the du Pont family. And the outsider was a man closely linked to the family.

4. Christiana was at first called Du Pont Securities Company. It took its present name in 1918.

5. The historical treatment is based on CHANDLER & SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 322-358 (1971). For other accounts see JAMES, ALFRED I. DU PONT: THE FAMILY REBEL (1941) (critical of Pierre and his associates and castigating them as "the secret six"), DONALDSON, CAVEAT VENDITOR (privately printed 1964) presenting the situation from Coleman's viewpoint.

6. The historical writings cited in the preceding footnote show that a family feud between Pierre and his cousin Alfred had much to do with Christiana's origins.

7. See *Delaware Realty and Investment Company*, 40 S. E. C. 469 (1961) (Footnote added).

> of the voting stock of General Motors, the family had practical control of that corporation."[8]

II.

The du Pont family is large. And since the family rewarded outstanding managerial performance with Christiana stock, there were some non-du Pont stockholders in Christiana from the very beginning.[9] So by 1940, when the Investment Company Act went into effect, Christiana had far more than a handful of stockholders.

Christiana registered under the Act. It had to do so for two reasons:

> (A) Christiana had more than the 100 security holders whose presence, with other facts, brings the Act into play.[10]
>
> (B) Christiana maintained, and still maintains, that it did not and does not run Du Pont. It insists that it is not Du Pont's parent. It concedes that it "has the potential to exercise a controlling influence over Du Pont," but it has consistently contended that this potential lies dormant and unexercised and that there is no actual control relationship. This, its own version of the facts, made, and makes, Christiana an investment company of the closed-end, non-diversified type rather than an industrial holding company.[11]

8. CHANDLER & SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 564-565 (1971). On page 565 the authors note that "During the 1920s Pierre and his brothers were obsessively concerned about assuring control."

9. CHANDLER & SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 581 (1971).

10. Section 3(c)(1).

11. For fuller discussion see this Commission's 1966 report on the PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, House Report No. 2337, 89th Cong., 2d Sess. 40, n. 54.

III.

Today Christiana is still what it was at its birth in 1915, a receptacle for a huge block of Du Pont common stock. It holds 28.3% of the issue. This massive commitment accounts for something like 98% of Christiana's total assets.[12]

Christiana's stock is still highly concentrated. While it has over 11 million common shares outstanding, 95.5% of them are held by a mere 338 people. Christiana remains in overwhelming measure a du Pont family affair, 75% of its outstanding shares being held by family members.

This does not mean that Christiana is just a collective name for the descendants of the original stockholders. It is a publicly held company with about 8,000 stockholders. There is an over-the-counter market in the issue, and for reasons hereinafter explained, Christiana shares have over the years had a certain appeal to a few of the many people who wanted to invest in Du Pont. It was—and for that matter, still is—cheaper to buy into Du Pont indirectly by buying Christiana than it was to acquire the underlying Du Pont shares themselves. Someone with $10,000 that he wanted to invest in Du Pont common could do so in one of two ways. The first was to buy $10,000 worth of Du Pont on the New York Stock Exchange. The second was to buy $10,000 worth of Christiana in the over-the-counter market. Since Christiana, like most other closed-end investment company issues, has long tended to sell at a substantial discount from net asset or liquidation value,

12. It also holds a small block of Du Pont preferred. The non-Du Pont assets consist of the two daily newspapers in Wilmington, Delaware, and 3.5% of the stock of the Wilmington Trust Company. *Qua* trustee for various du Ponts and du Pont relatives, the Trust Company holds more than half of Christiana's common stock.

the Christiana buyer got what could be regarded as a real bargain. His $10,000 purchased an interest in Du Pont that might have cost him $12,000, $13,000 or $14,000 had he acquired it in the direct Du Pont form rather than in the indirect Christiana form. One did not have to be a du Pont in order to see the point. The record suggests that some of the 338 large holders previously referred to may be wholly unconnected with the founding family. Although members of the du Pont family still hold about 75% of Christiana, the other 25% belongs to public investors.

IV.

Those who control Christiana (and who presumptively at least are for present purposes deemed to control Du Pont as well [13]) think that Christiana has outlived its usefulness. Du Pont, they say, is no longer a family firm. Hence the family no longer needs Christiana. It has no contemporary function.

And Christiana is expensive. It costs something to run. Much more important than administrative costs are the taxes that have to be paid because of Christiana's existence. For practical purposes, Christiana's income consists entirely of the dividends it collects from Du Pont. Yet Federal income tax has to be paid on those dividends before they can be distributed to Christiana's stockholders. Were there no Christiana and were the present Christiana stockholders to own their Du Pont shares directly, there would be no such tax.

Accordingly, Christiana's management urges that Christiana merge into its portfolio company, Du Pont.

13. Under Section 2(a)(9) of the Act an interest of more than 25% in voting securities is presumed to constitute control. We also note that Christiana and Du Pont have five common directors.

Du Pont's management agrees.[14] The salient features of the joint Christiana-Du Pont proposal are these: [15]

(1) Christiana's assets and liabilities will become those of Du Pont.[16]

(2) Accordingly, Du Pont will reacquire the 13,417,120 shares of its own common now in Christiana's portfolio.[17] Those shares will be retired.

(3) Each Christiana common share will become 1.123 shares of Du Pont.[18]

14. In addition to the five common directors referred to in the preceding footnote, another seven of Du Pont's 26 directors own Christiana common stock.

15. The application before us states that the 12 Du Pont directors who are also directors or stockholders of Christiana did not participate in the consideration of the merger proposal.

16. Du Pont intends to dispose of the newspaper interests and the bank stock (see n. 12 on p. 5, *supra*) to be acquired from Christiana.

17. Christiana's 16,256 shares of Du Pont's $4.50 preferred (0.96% of the outstanding shares of that class) will also be reacquired by Du Pont.

18. In time the present Christiana holders may also receive some additional Du Pont stock. This would stem from a contingent, unliquidated tax refund claim that Christiana now has against the United States. Du Pont will acquire that claim. If it collects on it within five years from the effective date of the merger, it will distribute additional shares of its common whose then current market value will equal the proceeds of the claim. Should the tax refund claim remain unsettled and unadjudicated within the aforementioned five-year period, the number of additional shares issued will be based on the then fair value of the claim.

The plan makes provision for the holders of Christiana's 106,500 7% callable preferred. Those shares are callable at $120. Accordingly, the plan calls for their conversion into shares of Du Pont with a then market value of $120, based on the average closing price of Du Pont common stock on the New York Stock Exchange for the ten trading days immediately preceding the effective date of the merger, plus cash equal to the accrued dividend. Du Pont states that its present intention is to offer dissenting Christiana preferred holders who follow Delaware's statutory appraisal procedures $120 in cash (plus the accrued dividend) for each share.

The merger is designed to be tax-free to Christiana and its stockholders. Accordingly, it is conditioned on a ruling to that effect by the Internal Revenue Service.

V.

Like other corporate mergers, this one cannot be consummated unless the law of the state of incorporation (in this case Delaware for both companies) is followed. Hence the stockholders of both companies must approve. Were this an ordinary amalgamation between industrial or mercantile firms, the merits of the matter would be none of our concern. Our responsibility would be solely that of seeing to it that the two companies' stockholders were told enough about the proposal to enable them to reach an informed judgment. The decision would be theirs, not ours.

But Christiana is an investment company, and the Congress that passed the Investment Company Act deemed transactions of this character to be fraught with potential for overreaching and unfairness.[19] Accordingly, it prohibited them,[20] subject to our power to lift the prohibi-

19. Section 1(b)(2) of the Act states that "the national public interest and the interest of investors are adversely affected—when investment companies are . . . managed . . . in the interest of directors, officers, . . . or other affiliated persons thereof . . . , in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders." Of special significance here is Section 1(b)(2)'s reference to investment companies' affiliated persons. Christiana and Du Pont are "affiliated persons" of each other. That is so because Christiana owns more (far more) than 5% of Du Pont's voting securities. See Sections 2(a)(3)(A) and 2(a)(3)(B).

20. Section 17(a)(1) of the Act makes it "unlawful for any affiliated person [of] . . . a registered investment company . . . knowingly to sell any security or other property to such registered company." The proposed combination would take the form of a statutory merger. But this would constitute a "sale" by Christiana

tion [21] "if evidence establishes that . . . the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of *any* person [22] concerned." [23]

Does this transaction meet that test? That is the central question before us.[24] A negative answer will end the

20. (Cont'd.)
of its assets to Du Pont within the meaning of Section 17(a)(1). *E. I. du Pont de Nemours & Company*, 34 S. E. C. 531 (1953), overruling *Phoenix Securities Corporation*, 9 S. E. C. 241 (1941).

21. Section 17(b) provides that "notwithstanding subsection (a), any person may file with the Commission an application for an order exempting a proposed transaction . . . The Commission *shall* [emphasis added] grant such application and issue such order of exemption if . . ."

22. Because of its special impact here the word "*any*" has been italicized. Its presence means that we must find this transaction fair to the stockholders of both companies. See *Bowser, Inc.*, 43 S. E. C. 277 (1967).

As we said in *Fifth Avenue Coach Lines, Inc.*, 43 S. E. C. 635, 639 (1967): "[T]hat Section 17(a) by its terms makes it unlawful for the affiliate, rather than the investment company, to engage in specified types of transactions, does not . . . indicate a Congressional concern for the shareholders of the investment company to the exclusion of the other stockholders affected. While it is true that the protection of fund shareholders was a primary consideration which led to the passage of the Act, we find nothing in the legislative history which persuades us that Congress intended the broad language of Section 17(b) to be read in the restrictive manner which applicants suggest, nor have we ever done so. We cannot believe the Congress intended, after requiring an agency of the Government to examine a transaction such as this, to put that agency in the position of effectively authorizing the transaction when there are circumstances raising questions as to possible overreaching of a person concerned which has public investors."

23. Section 17(b)(1).

24. But it is not the only question presented. Under Section 17(b)(2) we must also find the proposed transaction consistent with Christiana's policy. And Section 17(b)(3) precludes approval unless we find the merger consistent with the Act's general purposes. Its primary general purpose, of course, is the protection of investors. Finally, the parties invoke Section 17(d) and our Rule 17d-1 thereunder, which taken together prohibit joint enterprises

matter. Should our answer be in the affirmative, the managers of both companies will be at liberty to proceed to seek the approval of their stockholders.

VI.

At first blush it is hard to see a real problem here. In economic reality Christiana stock already is Du Pont stock—under another name. Substantially, all that we are dealing with is an exchange of equivalents.

Christiana owns 13,417,120 shares of Du Pont common. But there are only 11,710,103 Christiana common shares outstanding. It follows that a Christiana common share is in economic substance 1.15 shares of Du Pont common. Make a few simple adjustments for the relatively inconsequential preferred stocks of the two companies and for the newspaper interests and the bank stock that Du Pont will get from Christiana [25], and the whole thing is over.

That in essence is the view of the two companies involved. Our Division of Investment Management Regulation agrees. But three Du Pont stockholders disagree.[26]

VII.

The objecting Du Pont stockholders consider the view just outlined misleadingly simplistic. They contend that this transaction will:

24. (Cont'd.)
and joint arrangements between investment companies and persons affiliated with them, unless we approve the specific transaction involved.

25. See n. 12 on p. A44, *supra*.

26. These stockholders, Lewis C. Murtaugh, Richard J. Collins, Jr. and Daniel W. Maher, participated in the hearings before the administrative law judge. An initial decision having been waived, the case came to us after the record was closed. Briefs were filed, and we heard oral argument. Our findings are based on an independent review of the record.

(A) Confer great benefits on Christiana's stockholders;

(B) Give Du Pont's stockholders nothing worth mentioning but actually injure them; and

(C) Serve no real business purpose for Du Pont.

VIII.

The objectors are clearly right when they say that the merger will be a very good thing indeed for Christiana's stockholders. Their benefits will stem from:

(A) The federal tax structure; and

(B) Stock market phenomena.

We begin with the tax factors. There are two of them. One is the federal corporate income tax that Christiana now pays.[27] The United States Treasury takes 7.2 cents out of every dollar of dividend income that Christiana gets before such dividend income is disbursed to the Christiana stockholders.[28] So the merger will increase each Christiana stockholder's individual pre-tax income by 7.2% over what he would receive if Du Pont dividends continued to be passed through Christiana.[29] Of course, this 7.2% accretion will be taxable income in the individual stockholder's hands. A particular Christiana stockholder's net tax benefit will therefore depend on the tax bracket in which he happens to find himself. To the extent that Christiana stock is held by people in high tax brackets, the actual increment to the Christiana stockholders' net after taxes will be significantly less than 7.2%.[30] The second tax factor relates to the tax cost of alternative methods of achieving the end that the applicants wish to reach. Christiana could be killed off without any need for our prior (or for that matter subsequent) approval. Nothing in the Act or anywhere else in the law inhibits a registered investment company from liquidating. But a liquidation might be much more expensive for Christiana's stockholders than this tax-free plan.[31] Liquidation would certainly be a great deal more conjectural.[32]

27. Many closed-end investment companies do not pay federal corporate income taxes. They, like most of the open-end companies, avail themselves of the special treatment that Subchapter M of the Internal Revenue Code gives to so-called regulated investment companies, i.e., companies regulated by this Commission under the Investment Company Act. Such companies are free from all corporate income taxes so long as they distribute all of their income to their stockholders. But this special tax benefit is available only to "diversified" investment companies. Christiana, of course, is as undiversified as an investment company can possibly be. Hence its federal income tax status is no different from that of any other corporation. Sections 851-855 of the Internal Revenue Code.

28. The applicable normal corporate income tax is 48%. Section 11 of the Internal Revenue Code. But *all* corporations (whether investment companies or not) are entitled to deduct from their income 85% of any dividends that they receive. Section 243 of the Code. Thus the maximum effective federal corporate income tax on dividend income is 48% of 15% or 7.2%.

29. Christiana pays out substantially all of its after-tax income in dividends.

30. Additional savings will stem from the elimination of Christiana's operating expenses. The application states, however, that those expenses are "relatively minor."

31. Christiana's tax picture is said to be clouded by reason of the distributions of General Motors common stock resulting from the antitrust divestiture decree entered against Du Pont. *United States v. E. I. du Pont de Nemours & Co.*, 366 U. S. 316 (1961). We are told that this is so because:

> "(a) the fair market value of the General Motors stock received by Christiana pursuant to the antitrust divestiture decree . . . is the subject of a tax refund suit by Christiana against the United States Government and is thus presently indeterminable;
>
> (b) the effect of pro rata distributions by Christiana of General Motors stock to its own stockholders is uncertain under the tax laws, and
>
> (c) the effect of distributions by Christiana of General Motors and Hercules Powder Company stock . . . is uncertain."

32. Christiana's brief states that its "stockholders would in effect be voting tax litigation for themselves were they to sanction a liquidation."

In view of what has just been said about the special 7.2% tax burden on Christiana's stockholders, it would be unsurprising to find Christiana's shares selling at a discount of about that magnitude from net asset value.[33] Actually, however, the discount has been much higher than that. When the merge negotiations were first announced it was 23%. During the preceding two years it had been as high as 25% and was never below 20%.

The mere announcement of the planned merger led to an appreciable narrowing of the discount. Its consummation will, of course, extinguish the discount forever. Thus the merger will substantially enhance the market value of the Christiana stockholders' property.

What is the offsetting benefit to Du Pont's stockholders? Applicants point to the fact that Christiana's stockholders will get only 97.5% of its adjusted net asset value. This looks like a 2.5% discount from net asset value. But the actual dilution to be suffered by the Christiana stockholders will be only 1.8%. That is so because Christiana is so substantial a Du Pont stockholder. Since Christiana has a 28.3% interest in Du Pont, 28.3% of the 2.5% discount will go right back into the Christiana holders' pockets. Accordingly, objectors dismiss the discount as derisory, a mere "pacifier."

The objectors' claim of positive harm to themselves and the other similarly situated Du Pont stockholders rests entirely on market factors.[34] They point out that from a

33. Implicit in this statement is the somewhat unrealistic assumption of a market for Du Pont common that is entirely income-oriented.

34. Some Du Pont stockholders are also Christiana stockholders. Objectors do not weep for them. Their concern is with the people whose interest in Du Pont stems entirely from their ownership of its stock. Since there are over 225,000 Du Pont holders as against a mere 8,000 Christiana holders, it is obvious that most Du Pont stockholders belong to the class whose interests the objectors champion.

stock market point of view Christiana's massive block of Du Pont is sterilized. Christiana has never sold any of its Du Pont. Nor, so long as it remains in being, is Christiana ever likely to do so.

The enormous capital gains taxes that would have to be paid are enough in themselves to inhibit Christiana from selling any of its Du Pont holdings. Those taxes would arise at two levels. First, at the corporate level there would be a very heavy tax on Christiana itself. The basis of its Du Pont shares is but a tiny fraction of those shares' present value. And should Christiana follow its past practice of distributing all of its income to its stockholders, a second onerous tax would fall on the individuals who own Christiana.

Most of Christiana's stock has a very low basis in the hands of those who now hold it. That is so because:

> (A) The holders either paid much less for it than it is now worth or acquired it from donors who bought it for far less than present value; and
>
> (B) The basis of their Christiana shares has already been materially reduced by reason of their receipt of substantial qualities of General Motors stock, pursuant to the Du Pont diverstiture distribution.[35]

The objectors say that the merger will work a radical change in this state of affairs. They note that the corporate capital gains tax inhibition will vanish. After Christiana is dead and gone, no one will worry about the capital gains taxes that it would have had to pay had it remained alive. True, the holders of about 70% of Christiana's stock state that they have no present intention of selling the Du Pont

35. See n. 31 on p. A51, *supra*. Some 3 million Christiana shares (roughly 25% of the issue) have a zero basis.

shares to be received in exchange for their Christiana holdings. But the objectors point out that:

> (A) No binding commitments to refrain from selling have been given.[36]
>
> (B) The plan's carefully crafted provisions for Securities Act registration statements at the selling stockholders' expense (twice a year on a non-firm commitment basis and once a year on the basis of a firm commitment underwriting for at least $25 million) show that some important holders have given some thought to some selling at some time.
>
> (C) Public investors unrelated to Christiana's control group own about 25% of the company's stock. Hence the merger will give them about 3¼ million shares of Du Pont common. They will be as free as other non-controlling Du Pont stockholders to sell those shares whenever and wherever they choose without registering them under the Securities Act.

Objectors argue that the merger will have an adverse impact on them even if nobody actually sells. They ask us to focus on potential available supply. Such supply will, they say, be increased by over 13 million shares. The market's knowledge of this is bound to depress the price. Ergo, Christiana should be required to compensate the Du Pont stockholders for the "vast and virtually uncontrolled increase in the supply of marketable stock" flowing from the merger.

As for Du Pont, objectors argue that it has been doing well all these years and will continue to do well with or

36. Indeed, the Wilmington Trust Company, record owner of more than half of Christiana's outstanding shares (see n. 12 on p. A44, *supra*) states that its fiduciary responsibilities may require it to do some selling from time to time.

without Christiana; that applicants have failed to show that Christiana is an incubus to Du Pont; and that though the proposal does a great deal for the du Pont family, it does nothing of consequence for Du Pont. True, after the merger's consummation Du Pont will have about 188,500 fewer common shares outstanding than it now does. But presently outstanding shares of that issue number 47,445,810. So the number of shares outstanding will be diminished by a mere four-tenths of one percent.

One objector argues for a substantial increase in the contemplated 2.5% or 1.8% (depending on whether one looks at gross or at net impact) discount from Christiana's net asset value.[37] The other two also urge an increase in the discount. But they go on to attack the whole affair root and branch. They consider it an outrageous assault on the rights of the Du Pont stockholders and on the law of supply and demand. What they deem essential are conditions to "protect the price of Du Pont shares." They therefore implore us to impose restraints on the alienability of the new Du Pont common shares to be issued pursuant to the merger.

IX.

Applicants consider the objectors' contentions frivolous and absurd. So does our Division of Investment Management Regulation.[38] We take a different view. To

37. See p. A52, *supra*.

38. Though in accord with the applicants on every substantive point presented, the Division has certain qualms about the performance of the financial experts who testified on their behalf with respect to the value of Christiana's Du Pont holdings. It asks us to say some harsh words about those experts and to make a pronouncement about the role of an independent expert in a proceeding of this character. We agree with the Division that financial experts should be diligent, conscientious, and painstaking. On the record before us, we think it inappropriate to go beyond that truism. The im-

us the questions presented are substantial and troublesome. This is not an easy case. But after careful consideration of the issues raised, we find ourselves constrained to resolve them against the objectors and to grant the application before us.

That there is an imbalance of benefit is plain. This merger cannot possibly do as much for Du Pont as it will for Christiana. The very slight reduction in the amount of Du Pont's outstanding common and the resulting increase in earnings per Du Pont common share is incommensurate with the tax and the market value benefits inuring to the Christiana stockholders.

Applicants ask us to look at other benefits that will, they say, be reaped by Du Pont and its stockholders. We have done that. And we find their magnitude far from striking.

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38. (Cont'd.)
portance of expert testimony varies from case to case. In some situations such testimony is crucial. When a closely held firm or a business of an esoteric character must be appraised, much turns on what the experts say. *La Salle Street Capital Corporation,* Investment Company Act Release No. 6693 (August 23, 1971) is illustrative. That case presented a question about the value of a major league baseball franchise. Such questions are, as was said at page 7 of the *La Salle Street* opinion, "not susceptible to precise determination." The instant case, on the other hand, involves marketable securities. The questions presented are in our view essentially legal. Hence they cannot be resolved by reference to the opinions of financial experts, however conscientious and however eminent. We do not go so far as to say that expert testimony is of no weight here. Some of it we have found interesting and even instructive. But in view of the nature of the issues raised, we think its weight limited. We note, for example, that some of the experts seem to have spent a great deal of time studying our decisions under Section 17 of the Act and pondering the implications of the opinions in those cases. That sort of thing is normally the function of a lawyer, not of an expert witness. The Division has, we think, failed to give due heed to the special nature of this concrete case. Observations about experts in our past opinions have been mechanistically transposed to contexts quite different from those in which they were uttered.

Apart from the small reduction in the number of Du Pont shares outstanding and the resulting small increases in book value and in earnings per Du Pont common share, it is said that Du Pont will benefit from:

> (A) The "dispersal" of Christiana's large block of Du Pont common; and
>
> (B) Its escape from the Investment Company Act, which precludes it from entering into transactions with Christiana without our approval.

The "dispersal" argument is somewhat puzzling. Applicants insist over and over again that it is most unlikely that any substantial number of Du Pont shares will come to market by reason of the proposed transaction. In that regard applicants point quite cogently to the large individual capital gains taxes that selling Christiana holders will have to pay and to the long-run character of the du Pont family's investment commitment to the company that bears its name. What then is likely to be dispersed?

It would seem that the dispersal will be formal, not substantive. Today some people own a great deal of Du Pont indirectly through Christiana. Tomorrow those very same people will still own a great deal of Du Pont. But they will own it directly rather than indirectly. What will that change do for Du Pont?

DuPont's answers to these questions look to the long run. Its brief concedes that its "management was aware of no immediate prospect of any adverse consequences from the Christiana holdings." The brief goes on to argue, however, "that over the long term such a possibility might arise."

The precise nature of these possible long-term adverse consequences is obscure. The argument rests on the possibility of a future clash between the people then in

control of Christiana and the people then managing Du Pont. It assumes that in this hypothetical situation the Du Pont managers will be the "good guys" and the Christiana control group the "bad guys." The argument seems far-fetched and rests on premises we consider unacceptable. Christiana's extinction may well make it somewhat easier for Du Pont's managers to maintain themselves in office. We, however, cannot presume that this will necessarily be in the Du Pont stockholders' interest.[39] And in any event the Investment Company Act was not designed to foster the retention of control by managerial groups. Nothing in it warrants a holding that such control is to be preferred to control by important stockholders.[40]

No showing has been made that the Investment Company Act imposes any really onerous burdens on Du Pont. No doubt the applications that the company is required to file by reason of its affiliation with Christiana are something of a nuisance.[41] But no contention has been made that the Act has interfered or is likely to interfere with the company's business. Hence we find it is difficult to view Du Pont's exit from the Act's net as a significant benefit.

But the Act's requirement that the transaction be reasonable, fair, and free from overreaching, does not mean

39. As a former Chairman of this Commission recently observed: "The raider may . . . be a better manager than the raidee." Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 Bus. Law. 1101, 1105 (1974).

40. Certain Delaware decisions seem to hold otherwise. They are beside the point. Our concern here is not with the niceties of local corporation law, but with broad Federal investor-protection standards formulated in large measure because of the inadequacies of local corporation law. See Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L. J. 663 (1974).

41. Our files show that there have been approximately 50 applications since the Investment Company Act went into effect back in 1940.

that the benefits to the parties must be nicely balanced. Such a reading would be wholly impractical and would frustrate legitimate arrangements. Some transactions are more important to one side than to the other. This one is of that type. And that does not make it inherently unfair under Section 17(b). Nor does the fact that Christiana has much more at stake than Du Pont mean that the consideration moving from Christiana to Du Pont must be large enough to inflict really substantial detriment on the former.

The benefit to Du Pont is far from awesome. But it is sufficient to meet the statutory standard. Christiana is a legal device. Those who invented it did so to serve their own purposes.[42] And they had every right to do that.

42. The parties did not go into Christiana's history on the record. But we thought it appropriate to take administrative notice of some fairly well-known facts of economic history. And we did so at the outset of this opinion. We cannot forget that Christiana as an investment company is of a very special kind and that the situation with which we are confronted was created long, long before anyone dreamed of any such statute as the Investment Company Act. Compare *Hawaiian Electric Company, Inc.*, Holding Company Act Release No. 16592 (January 26, 1970), p. 5 where our view of the Public Utility Holding Company Act's impact on the matters there before us was much influenced by Hawaii's unique history.

The Public Utility Holding Company Act to which we have just referred has a certain bearing here. As applicants note, Section 11(b)(2) of that statute mandates the elimination of unnecessary holding companies in the industries affected. Were that Act applicable to Christiana, it would have vanished long ago. Nobody suggests that it serves any real purpose in the world of today. Of course, Du Pont is neither an electric company nor a gas company. So we have no power to destroy Christiana on our own motion. But we think the policy against the multiplication of superfluous corporate entities articulated in the Holding Company Act sound and salutary. When as here questions about wholly unnecessary entities come before us in non-utility contexts, it is quite inappropriate for us to insist on their perpetuation or to impose terms likely to lead the parties to conclude that it would be cheaper and better to keep them alive.

Now the investors' heirs and successors in interest conclude that the device is obsolete. That is their privilege. Nothing in the Act compels them to pay a high price for exercising it.[43] Only if their decision to dismantle

43. But they must pay a fair price. And in assessing the fairness of the proposed price one is struck by the fact that the Securities Act restricts the marketability of Christiana's massive block of Du Pont. Objectors do not demur to the proposal on this ground. Nor does our staff. We, however, have considered the question *sua sponte*. We have done so because (1) as the Commission pointed out some years ago, "the valuation of restricted securities at the market quotations for unrestricted securities of the same class would, except for most unusual situations, be improper." ("*Restricted Securities*," Investment Company Act Release No. 5847, Accounting Series Release No. 113 (October 21, 1969)); and (2) in the normal case a discount of only 2.5% from net asset value would be much too small to reflect the diminution in value resulting from the restrictive feature. After such consideration, we find this one of those "most unusual situations" referred to in the above-cited release in which it is proper to value restricted securities at the price assigned by the market to unrestricted securities of the same class.

The typical investment company-restricted security situation involves the acquisition of a block of restricted securities for investment at a price below that at which unrestricted securities of the same class are selling, with the discount (usually a substantial one) being attributable to the restrictions imposed by the Securities Act on persons who take securities in so-called private placements. None of these factors is present here. Christiana's 13,417,120 shares of Du Pont were not acquired for investment in the ordinary sense of that term. Those shares are a historic control block assembled almost two decades before anyone thought of any such statute as the Securities Act. And although the price Christiana paid for its Du Pont holdings was nominal when viewed in relation to their present value, it received no discounts at the time of purchase. What has just been said is more than historical digression. It has contemporary relevance. A block of securities restricted under the Securities Act because it is large enough to confer control cannot be equated mechanically for all purposes with smaller non-controlling blocks restricted only because they were acquired in transactions claimed to have been exempt from the Securities Act's registration and prospectus-delivery requirements by reason of the special provision in Section 4(2) of that statute for "transactions . . . not involving any public offering." Our policy with respect to the valuation of restricted stock by investment companies rests on two principal considerations. First, the impropriety of an in-

Christiana inflicts cognizable harm on Du Pont and on its stockholders unrecompensed by the proposed discount, can we insist on terms harsher for them than those now before us.[44]

43. (Cont'd.)
vestment company recording essentially fictitious profits by buying restricted stock at a discount and then marking it up to the market; and secondly, the fact that stock which cannot be publicly sold without registration normally is worth less than stock which is free for trading. Neither consideration is applicable here. Christiana did not acquire Du Pont stock at a discount by reason of the status of that stock under the Securities Act, and Christiana never intended to, and never has, traded in and out of Du Pont stock. If Christiana had ever made the clearly momentous decision to attempt to sell its Du Pont stock, registration under the Securities Act would have been the least of its problems.

Also pertinent in this regard is the fact that much (probably most) of the Du Pont stock to be received by the Christiana stockholders will itself be restricted under the Securities Act. To discount the value of those persons' present indirect holdings in Du Pont on the ground that those holdings are restricted under the Securities Act and then to give them new direct Du Pont shares that would be similarly restricted, would involve a double subtraction that we deem impermissible.

44. It might seem that the discount should at the very least equal the 7.2% income tax benefit to be realized by the Christiana stockholders. However, their actual benefit will in most cases be less than 7.2%. See A50 & A51, *supra*. This consideration, however, we put to one side. The heart of the matter is that the tax benefit to be reaped by the Christiana people will inflict no corresponding detriment on Du Pont or on its stockholders. The burden will fall wholly on the United States. And neither the du Pont family nor the other Christiana holders are under any duty to maximize their tax liabilities. As the Court of Appeals for the Second Circuit said when it spoke through Judge Learned Hand in *Helvering v. Gregory*, 69 F. 2d 809, 810 (1934): "Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." Also in point are Judge Hand's subsequent observations when he dissented in *Commissioner v. Newman*, 159 F. 2d 848 (C. A. 2, 1947), *cert. denied* 331 U. S. 859 (1947): "[T]here is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of

Another aspect of this case illustrates that principle. The Christiana stockholders could have caused Christiana to be liquidated. They would then have become the direct owners of the Du Pont shares now held by Christiana. Had they done so, the situation would have been essentially the same as that contemplated by this merger.

But a liquidation, unlike this merger, would have adverse tax consequences for Christiana's stockholders. And in view of the problems attributable to the General Motors divestiture, the extent of their potential tax liability is shrouded in uncertainty.[45] The proposed merger is thus designed to avoid the serious tax problems that Christiana's liquidation would engender for its stockholders. Aside from those tax problems, however, the economic impact of this merger on Du Pont and its stockholders is no more onerous than the impact that would be produced were the Christiana stockholders to exercise their prerogative to liquidate Christiana. More specifically, the possible market effects resulting from the Christiana stockholders acquiring direct ownership of the Du Pont shares would be the same. It may be that in the course of bargaining between wholly unrelated parties, Du Pont could have exacted a handsome price for permitting consummation of the transaction in a form that relieves the Christiana stockholders of their tax problems. But Du Pont's failure to do that does not render the transaction unreasonable or unfair. The Du Pont stockholders, including the objectors, have no property interest in the Christiana stockholders'

44. (Cont'd.)
morals is mere cant." 159 F. 2d at 850-851. Nor do we see how Section 17(b)'s "reasonable and fair" standard can be deemed to require Christiana's stockholders to turn every nickel of their tax savings over to Du Pont. The tax savings are of some weight. But it does not follow that the Du Pont stockholders are to be subrogated to the rights that the United States now enjoys under the status quo.

45. See n. 31 on p. A51, *supra*.

tax problems. A principal reason why Section 17 of the Investment Company Act requires us to pass upon the fairness of transactions such as this, is to prevent persons in a strategic position from using that position to effect transactions for other than fair value. And fair value does not change simply because a strategic position arises from something other than affiliation.

X.

That brings us to what we think the crux of the case: the objectors' claim of detriment by reason of market impact.

Here we find a hot dispute about the probable facts. Objectors envision endless torrents of Du Pont shares descending on the market. Although never too clear about exactly what they expect to happen, they profess great alarm about the low prices to which Du Pont common will fall.[46] Applicants laugh at that. They say that nobody is going to sell anything. Christiana's brief tells us that:

46. But they never explain why Christiana's holders would be eager to sell at such depressed levels. Objectors have no doubts about Du Pont's investment merit. Indeed, they think Du Pont a pearl of great price. Nor do they suggest that those who guide Christiana's destinies have any real doubts about Du Pont. The objectors' position is self-contradictory. On the one hand, they stress the great wealth of the du Ponts. On the other, they are (or claim to be) obsessed by the virtual certainty of massive sales at distress prices. But why should people whose remoteness from the brink of destitution is constantly stressed by the objectors themselves rush off madly to dispose of valuable property for less than its intrinsic worth? Objectors never answer that question. Instead they shift their ground by moving from the Christiana control group to the non-controlling public investors who own about 25% of Christiana. These people, they note, will be free from the Securities Act's registration and prospectus-delivery inhibitions. They proceed to postulate devastating waves of helter-skelter selling by the public holders. These horribles seem fanciful to us. We see no reason to assume that there will be a psychosis epidemic among either the controlling or the non-controlling Christiana stockholders. We think that in financial matters at least both groups are at least as rational as the general run of Humanity.

> "In the present situation, there is no reason to suppose that the distribution of Du Pont shares to Christiana stockholders will add even one share to the market for Du Pont stock. The consummation of the merger will simply leave the Christiana stockholder with Du Pont shares in place of the Christiana shares he has formerly held—in most cases—for many years. There is no reason to suppose that the Christiana stockholder will sell those shares . . . [A]dverse tax consequences will be visited on a former Christiana stockholder if he does sell Du Pont stock. Those consequences are a strong deterrent to sale since receipt of the Du Pont stock in the merger will be tax-free."

We think the objectors' prophecies much too gloomy.[47] Hence it looks to us as though the applicants have the better of the argument. But we refrain from enmeshing ourselves in this thicket of conjectures about what people are likely to do in the future with their own property.

We assume that the merger may engender some selling that would otherwise not take place. We assume further that such selling may at certain points in time be substantial. Proceeding on those assumptions, we are nevertheless after considerable thought unable to detect any uncompensated detriment to the Du Pont stockholders of a type that we can properly take into account.

The stock market has its peculiarities. In essentials, however, it is much like other more basic markets in goods, services, and the factors of production. Here as elsewhere increased supply will (all other factors being equal—which in practice they may or may not be) lower prices. Should the Wilmington Trust Company decide to sell a substantial amount of Du Pont common, the price of the issue will be affected to some extent.

47. Our reasons have been stated in the preceding footnote.

We agree with the objectors about that. But we disagree with their contention that this short-run view of the pricing process is the one that governs here. What we have before us in these proceedings is a proposal for a fundamental corporate readjustment. In that context transitory market phenomena are of secondary significance. We look at the case not from the objectors' tape-watcher perspective,[48] but as a problem in economic realities and business fundamentals.[49]

48. We cast no aspersions on tape watchers. They have every right to speculate. And while pursuing their own self-interest, they sometimes perform a useful social function. Hence they are often the objects of our solicitude. But that is so in matters arising under the Securities Exchange Act. When we work under this Act, under Chapter X of the Bankruptcy Act, and under the Public Utility Holding Company Act, their interests yield to those of the long-term investor.

49. We may draw attention to what we consider the striking parallel between Section 17(b)(1)'s reasonable, fair, and free from overreaching test and the "fair and equitable" standard that Congress laid down in the Bankruptcy Act (Sections 174, 221(2)), and in the Public Utility Holding Company Act (Section 11(e)). True it is that the words "fair and equitable" have a precise technical meaning in insolvency law. Nor are we unmindful of the distinctions that may well be drawn between a legally mandated reorganization under the Holding Company Act and a consensual arrangement such as the one now before us. But the ancient reorganization concept of "fair and equitable" also has a broader meaning that we think indistinguishable from the Investment Company Act test that governs here. See *Protective Committee v. Anderson*, 390 U. S. 414, 424-441 (1968).

Hence we find the many reorganization cases that emphasize intrinsic value and deprecate market factors persuasive here. See, e.g., *S. E. C. v. Central-Illinois Securities Corp.*, 338 U. S. 96, 152 (1949) ("Congress, perhaps believing that the application of such an amorphous standard as that of 'colloquial equity' was beyond the competence of courts and commissions, has instead prescribed the requirement that investment values be preserved."); *Niagara Hudson Power Corp. v. Leventritt*, 340 U. S. 336, 346-348 (1951) ("The informed judgment of the Commission, rather than that of the market, has been designated by the Act as the appropriate guide to fairness and equity within the meaning of the Act. Under the standards approved by this Court, that informed judgment looks for

Hence we find ourselves compelled to discount objectors' market impact worries even more heavily than they would have us discount Christiana's net asset value. A share of Du Pont common is a fractional proprietary interest in a large business. In no way will the Christiana merger detract from either the assets or the earning power of that business. The fundamentals of the situation will remain as they are. Thus the merger cannot affect—and no contention has been made that it would or could affect—Du Pont's intrinsic investment value. That the merger might possibly engender selling of a volume that could on occasion cause Du Pont's market price to dip below the level at which it would otherwise stand is of little moment. Such undervaluation would undoubtedly attract the attention of investors and speculators interested in chemical issues. They could scarcely escape noticing it. And why would they spurn the resulting bargain? Nothing brought to our attention suggests that the marketplace might be slow to notice Du Pont's cheapness relative to comparable stocks. And we see no reason to assume that it would. We therefore conclude that such depressing effects on the price of Du Pont common as may occasionally manifest themselves by reason of the proposed transaction will be of relatively brief duration. We proceed on the premise that

49. (Cont'd.)
investment values. . . . [T]he *Central-Illinois* case . . . expressly rejected the 'colloquial equity' approach of the District Court, which placed special emphasis upon market history. . . . Moreover, we find no lack of authority . . . [for] the general principle that a class of securities may go unrecognized in a reorganization when . . . they have no investment value.") Pertinent here are the District Court's observations at the close of its opinion in *In re Imperial '400' National, Inc.*, 374 F. Supp. 949, 978 (D. N. J., 1974): "Concern has been expressed . . . with respect to the market value of new . . . stock as opposed to its investment value. No matter how carefully I may calculate 'value,' I have no control over what may happen to price in the public market. But my concern under the Bankruptcy Act is value and not price."

over time the securities markets are rational.[50] And if that premise be sound, an issue as well-known and as conspicuous as Du Pont common cannot remain on the bargain counter for long.[51]

Suppose that we were inclined to see more abstract merit than we do in the objectors' market impact argument. Even then we would be unable to give it much weight in deciding the concrete case before us. How can we possibly tell how much Du Pont common is likely to come to market by reason of this merger in 1976? 1980? 1985? And even if we could form some educated guesses about that, how would we measure the impact of the addi-

50. The premise may or may not be empirically demonstrable. Some academicians who speculate about the nature of speculation question it. But see the observations on "central value" and "intrinsic value" in GRAHAM, DODD & COTTLE, SECURITY ANALYSIS 26, et seq. (4th ed., 1962). We, however, are not at liberty to question it. The statutes we have been directed to administer start from the axiom that markets are or can be made economically rational. We are no freer to question that axiom than we are to question the desirability of registration statements and prospectuses under the Securities Act. If prices and values are as unrelated to each other over time as the objectors contend, the Investment Company Act is nonsensical and this Commission's labors under it farcical. For obvious reasons we take a different view.

51. The closed-end discount that pervades this case may raise doubts about this. The closed-end discount phenomenon, which is neither peculiar to Christiana nor of recent vintage (see our previously cited 1966 report on the PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH at pp. 42-44; see also Metz, *Unkindly Year in Closed Ends*, N. Y. Times, January 11, 1974 at 42, col. 3; *Where Stocks Can Be Bought at a Discount*, U. S. NEWS & WORLD REPORT, May 27, 1974, p. 61) has its intriguing and to some extent disquieting aspects. But we see nothing in it that serves as an augury about the probable market action of a stock like Du Pont. Closed-end companies are seldom liquidated. Investors attracted to them by the discount assume the risk that the discount may widen against them. And in Christiana's case special factors come into play. Du Pont is an active, well-known listed stock. Christiana, on the other hand, is a thinly traded over-the-counter issue. The *relative* illiquidity of an investment in Christiana would seem to have had some influence on the discount.

tional supply on the market price? The objectors are unable to supply us with supply and demand schedules for Du Pont common for the ensuing decade.[52] And we decline to construct our own.[53] Speculations about the probable behavior patterns of speculators are much too slender a reed on which to predicate findings of fairness under the Investment Company Act.[54]

Even if we had the light of hindsight available to us, we could not properly focus on the factors that the objectors consider central.

Suppose that we were able to take another look at this case some years after the merger. Du Pont's actual post-merger market history would then be available to us. But it would be of little help. Stock prices are volatile and the factors that influence them multifarious.[55] We know of nothing that would permit an accurate post-merger assessment. A pre-merger one would obviously be an even wilder guess.

52. Were there any such schedules, their very existence would alter the situation. If investors and speculators had the benefit of perfect foresight, they would alter their plans.

53. Having denounced investment advisers who "vie with each other in making unsupportable claims to prophetic insight" (*Spear & Staff, Incorporated*, 42 S. E. C. 549, 556 (1965)), we refrain from similar transgressions of our own.

54. Compare *Jade Oil & Gas Co.*, Corporate Reorganization Release No. 289, p. 14 (September 15, 1969).

55. Du Pont is generally regarded as an issue of prime investment quality. Applicants and objectors agree on that. Yet during 1974 its price has ranged from 179 to 84½. Lest 1974 be tossed off as an especially disturbed year, we look for comparative purposes to 1970-1972. And we find that during those years the price ranged from 184 to 92. Du Pont is now selling at 8 times earnings. Not too long ago it was selling at 24 times earnings. Some years ago it was at 27 times earnings. These numbers show the inherent futility of any effort to measure the impact of incremental supply. Yet objectors ask us to assess the psychological effects of purely potential supply.

XI.

At times the law undertakes explorations almost as speculative as those on which the objectors ask us to embark. Thus in the law of tort judges and juries place price tags on pain and suffering—and indeed on human life itself. And to come closer to home, in reorganizations under the Bankruptcy and Public Utility Holding Company Acts we and the courts try to estimate the probable future earnings of business enterprises and the multiples at which it is appropriate to capitalize those earnings.[56] Those inquiries are undertaken because justice requires that the effort be made.

That differentiates those situations from this one. Here justice requires no ventures into the unknown and unknowable. An investment company, whose assets consist entirely or almost entirely of securities the prices of which are determined in active and continuous markets, can normally be presumed to be worth its net asset value. What better guide to its value could there be? The simple, readily usable tool of net asset value does the job much better than an accurate gauge of market impact (were there one) could. The record indicates that most of Christiana's stock is held by long-term investors. Hence there is no pressing need to depart from the net asset value test.[57]

56. See *Consolidated Rock Products Co., v. Du Bois*, 312 U. S. 510, 526 (1941) quoted with approval in *Protective Committee v. Anderson*, 390 U. S. 414, 441-442 (1968): "The criterion of earning capacity is the essential one . . . Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."

57. Investment companies are as a general rule media for long-term investment. That makes net asset value the touchstone. And the Act is based on that premise. Section 2(a)(41)(B) states that "'Value' with respect to assets of registered investment companies . . . means . . . with respect to securities for which market quotations are readily available, the market value of such securities."

That understates matters. In these circumstances, any significant departure from the net asset value criterion would work positive injustice. Objectors' proposals would strip the long-term Christiana investor of some of the intrinsic value of his holdings. Such expropriation would be wholly unjustifiable. It would also be most inappropriate to frustrate the reasonable expectations of those who bought into Christiana in the belief that it was a legitimate way of buying Du Pont at a lower price.[58]

XII.

Having concluded that pecuniary assessment of hypothetical future market impact would be unnecessary and inappropriate,[59] we turn to the objectors' suggestions for

57. (Cont'd.)
And although the closed-end discount phenomenon was well-known in 1940, the Congress that passed the Act chose to protect closed-end stockholders against dilution of intrinsic values rather than to facilitate the sale of new closed-end shares. Section 23(b) of the Act shows that. It provides that "No registered closed-end company shall sell any common stock of which it is the issuer at a price below the current net asset value of such stock." And we have viewed net asset value as the controlling factor in Section 17 proceedings. See, e.g., *Harbor Plywood Corporation*, 40 S. E. C. 1002, 1010 (1962); *Delaware Realty and Investment Company*, 40 S. E. C. 469, 473 (1961). Compare *Central States Electric Corporation*, 30 S. E. C. 680, 700 (1949) (advisory report on plans for the reorganization of a closed-end investment company under Chapter X of the Bankruptcy Act urging "net asset value as the primary measure of value of an investment company.").

58. Objectors talk of windfalls. We cannot detect them. True, people bought Christiana on the theory that it was a cheap way of buying Du Pont. But those who did that took the risk that the closed-end discount might widen against them. Those who reasoned that long-run value would win out in the end and that Christiana could not last forever will do well. But such rewards for astuteness and lucky guesses are inherent in the nature of markets.

59. Objectors make much of certain assertedly contrary positions said to have been taken by the applicants, their controlling persons and their counsel and financial advisers in the Du Pont-General Motors divestiture proceedings. See *United States v. E. I. du Pont*

restraints on the alienation of the Du Pont shares to be issued under the merger.[60]

The Securities Act is now 41 years old. Hence there is nothing novel about the idea that it is in the public interest and appropriate for the protection of investors to inhibit certain strategically situated persons from selling securities whenever and wherever they choose. But neither the Securities Act nor the Securities Exchange Act prohibits such people from selling. What those statutes prohibit are offers and sales without appropriate disclosure. It is a long, long jump from that to an unconditional ban on any sales at all. And quantitative limits on a holder's freedom of sale that rest not on the buyers' need for disclosure, but on the assumed desirability of protecting other holders from the market effects of large-scale selling would entail almost as broad a leap. We see no need for such a leap in this case.[61]

59. (Cont'd.)
de Nemours & Co., 353 U. S. 586 (1957); 177 F. Supp. 1 (N. D. Ill., 1959); 366 U. S. 316 (1961). But the views that the applicants found it convenient to take in another case under another statute before another forum are not controlling here. Moreover, the General Motors situation had nothing in common with this one. There Du Pont was to distribute its millions of General Motors shares to Du Pont's stockholders. Under the Internal Revenue Code, as it then was, the recipients of those shares would have been deemed to have realized taxable income. So they would have had to pay taxes. To raise the money with which to pay those taxes, they would or might have had to sell at least some of the General Motors shares that they received by reason of the divestiture. (This problem was solved for the most part by the addition of Section 1111 to the Internal Revenue Code.) Here no taxes need be paid except by those Christiana holders who may voluntarily decide to sell. Nor are the governing legal standards the same. The Internal Revenue Code's standard is "fair *market* value." The word "market" is conspicuously absent from Section 17(b).

60. No specific suggestions are made.

61. Objectors seek to protect their property rights. But the Christiana stockholders also have property rights. It is not for us to prefer one group's property rights over the other's. The Du Pont

XIII.

We said earlier that this is not an easy case. But its difficulties do not stem from the hypothetical market impact on which objectors focus. They flow rather from the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont. This disparity justifies the proposed 2.5% or 1.8% discount from Christiana's net asset value. That is not to say that applicants have come up with *the* one right figure. There is no such figure. Fairness is a range, not a point. Something less than the discount arrived at by the applicants might well pass muster.[62] And a slightly higher discount would also be within the permissible range. But one appreciably higher than the discount now before us

61. (Cont'd).
stockholders are far more numerous than the Christiana stockholders. See n. 34 on p. A52, *supra*. But that is of no consequence. These matters are not resolved by plebiscite. Section 17(b)(1) seeks to prevent "overreaching on the part of any person concerned." Compare *Protective Committee v. Anderson*, 390 U. S. 414, 435 (1968): "[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it."

62. Objectors say that the applicants' negotiations were not at arm's-length. And in view of the links between Christiana and Du Pont they may well be right about that. It matters not. In assessing fairness we look not to the nature of the negotiations but to their results. It is precisely because transactions of this character are replete with inherent conflicts of interests that the Act requires that they be submitted to us. As we said in *Atlas Corporation*, 37 S. E. C. 72, 85-86 (1956): "It is evident that Section 17 of the Act was not designed to prohibit transactions solely for the reason that they are not negotiated at arm's-length. On the contrary, Section 17(b) of the Act directs us to exempt transactions between controlling or affiliated persons where the evidence establishes that the terms thereof are reasonable and fair and do not involve overreaching on the part of any person concerned. Clearly, Section 17 contemplates that transactions meeting these standards will be permitted although arm's-length bargaining may not have been present or, indeed, may have been impossible in view of the relationship of the parties."

would divest Christiana's stockholders of a significant portion of the intrinsic investment values to which they are legally and equitably entitled. It would therefore run afoul of Section 17(b)(1) of the Act.[63]

XIV.

We find the proposed merger:

(A) Reasonable and fair;

(B) Free from overreaching on the part of any person concerned;[65] and

(C) Consistent with the general purposes of the Act.[66]

63. That being our view of the law of the case, we see no merit to the objectors' contention that the record is so inadequate on the market impact aspect of the matter as to require a remand. Nor do we see any basis for the claim that adequate discovery about the Christiana control group's present intent to sell or refrain from selling in the future was improperly denied. To have delved into the matters into which objectors sought to inquire would have swelled the record pointlessly. Moreover, our Rules of Practice make no provision for the taking of depositions in situations other than those covered by Rule 15(a) of those rules. There may be a trend toward liberality in pre-trial discovery. But that did not empower the administrative law judge to disregard the plain meaning of our rules. Due process does not require depositions. See *Miner v. Atlass*, 363 U. S. 641 (1960); *N. L. R. B. v. Interboro Contractors, Inc.*, 432 F. 2d 854, 857-858 (C. A. 2, 1970), *cert. denied*, 402 U. S. 915 (1971).

65. We made no findings under Section 17(b)(2), which requires that the proposed transaction be consistent with the investment company's policy. That section has no bearing on cases in which investment companies propose to go out of existence. See *Aviation and Transportation Corporation*, 8 S. E. C. 527, 538-539 (1941).

66. That is so because it will eliminate pyramiding duplicative operating expenses, and unnecessary taxation. See the *Aviation and Transportation* case cited in the preceding footnote, at page 539 of 8 S. E. C.

The standards of Section 17(b) being met, there is no need to invoke Section 6(c).[67]

An appropriate order will issue.

By the Commission (Chairman GARRETT and Commissioners LOOMIS, EVANS, SOMMER and POLLACK).

GEORGE A. FITZSIMMONS,
Secretary.

67. Applicants also pray for exemption relief from Section 17(d) of the Act and our Rule 17d-1 thereunder. No issue has been raised as to the applicability of those provisions. Hence we assume without so deciding that they may have some bearing here. To the extent, if any, that this is so, we find the standards of that section and that rule satisfied.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Rel. No. 8615/December 13, 1974

Admin. Proc. File No. 3-3928

In the Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware

E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)

ORDER GRANTING APPLICATION.

Christiana Securities Company, a registered closed-end non-diversified investment company, and E. I. du Pont de Nemours and Company, its affiliate, made joint application under Sections 17(b) and 6(c) of the Investment Company Act for an exemption from Section 17(a) of certain transactions incident to a merger of Christiana into Du Pont. The application also sought permission to effect such transactions under Section 17(d) and Rule 17d-1.

Hearings were held after appropriate notice. An initial decision by the administrative law judge was waived. Proposed findings and briefs were filed. And the Commission heard oral argument.

The Commission has this day issued its Findings and Opinion. On the basis of such Findings and Opinion, it is

ORDERED that the proposed transactions be, and they hereby are, exempted from Section 17(a) of the Investment Company Act; and it is further

ORDERED that said transactions be, and they hereby are, exempted from Section 17(d) of that Act and from Rule 17d-1 thereunder.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Rel. No. 8692/February 27, 1975

Admin. Proc. File No. 3-3928

In the Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware

E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)

MEMORANDUM OPINION AND ORDER DENYING REHEARING AND LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

PRACTICE AND PROCEDURE

Rehearing

Petitions for rehearing, *denied*, because they raised nothing new and did not convince the Commission that prior result was erroneous.

Additional Evidence—Leave to Adduce

Application for leave to adduce additional evidence in support of a factual hypothesis that the Commission had already accepted but had held irrelevant under governing legal standards, *denied*.

APPEARANCES:

Lewis C. Murtaugh, of Murtaugh & King, *pro se*.

Richard J. Collins, Jr., pro se.

Kenneth W. Gemmill, Stephen R. Miller, Matthew J. Broderick and *Richard S. Seltzer*, of Dechert, Price & Rhoads, for Christiana Securities Company.

Daniel M. Gribbon, Cyril V. Smith, Jr. and *Peter B. Archie*, of Covington & Burling, for E. I. du Pont de Nemours and Company.

Gerald Osheroff, for the Commission's Division of Investment Management Regulation.

I.

The objecting shareholders whose contentions were rejected in Investment Company Act Release No. 8615 (December 13, 1974), 5 SEC Docket 745 seek rehearing. But their petitions raise nothing of substance that is new.[1] Nor do they convince us that our original decision was wrong.

II.

One objector also asks for leave to adduce additional evidence. That consists of:

(A) Seven specifically identified documents that could, he suggests, "aid . . . a court on review and . . . help them [sic] visualize the factual situation and various publicized statements and the interrelationships"; and

1. That is so even though the principal petitioner received an unprecedentedly generous extension of time to enable him to perfect his petition. He told us that such extension was needed because of the complexity of the case. Agreeing that an extension was appropriate, we granted his request over the applicant companies' strenuous objections.

(B) Unspecified materials said to have been discovered in a pending shareholder's derivative action.

Petitioner does not contend that the identified documents are material.[2] As already noted, he states only that they might "help" a reviewing court to "visualize the factual situation." But how would they do that? Petitioner doesn't say.[3]

The unidentified evidence said to have been gathered in the derivative action goes to petitioner's market impact contentions. Petitioner wants to show that the proposed merger will lead to massive sales of Du Pont's common stock and that this *"goes right to the fairness issue."* (Emphasis his.) But we have already said in our opinion that: "We assume that the merger may engender some selling that would otherwise not take place. We assume further that such selling may at certain points in time be substantial."[4] So petitioner wants to adduce additional evidence in support of a hypothesis that we have already accepted on the record as it stands. No showing has been made that such additional evidence would serve any useful purpose.

2. They consist of three notices of annual meetings, a proxy statement with respect to one of those meetings, one of Christiana's semiannual statements, a report by Christiana to us on our Form N-1R, and another company's annual report. Four of these documents were available when the hearings were held. Petitioner claims to have discovered "most of this material" after the close of the hearings herein. But in view of their nature and ready accessibility it seems to us that petitioner would have learned of these papers earlier—had he been reasonably diligent. Most of the documents are in our public files and hence available to anyone who wants to look at them.

3. With respect to only a single document does the petitioner state what he wants to show through it. He says in effect that it shows that the applicant companies are under common control. We have already held that this is so. Release at p. 6, 5 SEC Docket at 752.

4. Release at p. 19, 5 SEC Docket at 750.

Petitioner's argument that the projected selling "goes right to the fairness issue" is legal, not factual. We rejected that argument because we think such selling irrelevant to the fairness issue framed by the Investment Company Act. That holding does not turn on evidentiary details. It rests on our reading of the Act.[5] Hence additional evidence cannot alter the result.[6]

We conclude that the instant application does not meet the test prescribed by Rule 21(d) of our Rules of Practice, which requires that an application for leave to adduce additional evidence "show . . . that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence . . . before . . . the hearing officer."[7]

III.

Accordingly, IT IS ORDERED that the petitions for rehearing and the petition for leave to adduce additional evidence be, and they hereby are, in all respects denied.

By the Commission (Chairman GARRETT and Commissioners LOOMIS, EVANS, SOMMER and POLLACK).

GEORGE A. FITZSIMMONS,
Secretary.

5. In footnote 38 to our opinion (Release at p. 14, 5 SEC Docket at 754) we said that "the questions presented are in our view essentially legal."

6. Petitioner recognizes this. He says in his petition: "Reading the opinion of the Commission leaves the impression that there is no fact question that could move the Commission to abandon the legal rulings which seem to preclude and indeed preempt factual issues . . . there is little that can be done by way of evidence."

7. *Cf. Gross v. S. E. C.*, 418 F. 2d 103, 108 (C. A. 2, 1969).

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C. 20549

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Application File No. ————

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In the Matter of
CHRISTIANA SECURITIES COMPANY
AND
E. I. DU PONT DE NEMOURS AND COMPANY

Investment Company Act of 1940

Sections 17(a), 17(b), 17(d), 6(c) and 8(f)

Christiana Securities Company (Christiana) and E. I. du Pont de Nemours and Company (Du Pont), both of which are sometimes collectively referred to hereinafter as "Applicants" and each of which is a Delaware corporation having its principal office in the City of Wilmington, State of Delaware, hereby make application pursuant to Sections 17(b) and 17(d), including Rule 17d-1 thereunder, and 6(c) of the Investment Company Act of 1940 (the Act) for an order exempting from the prohibitions of Sections 17(a) and 17(d) of the Act the proposed transaction described herein, whereby Christiana would merge into Du Pont. As a result, Du Pont would acquire all of the assets of Christiana, consisting principally of Du Pont common stock, and the outstanding capital stock of Christiana would be converted into Du Pont common stock. Application is also hereby made under Section 8(f) of the Act for deregistration of Christiana, as indicated below.

Christiana, a registered investment company of the closed-end, nondiversified, management type, owns approximately 28.3% of the outstanding common stock of

Du Pont. Under Section 2(a)(9) of the Act, Du Pont is presumed to be controlled by Christiana and, under Section 2(a)(3) of the Act, Applicants are affiliated persons of each other. Moreover, as indicated below, certain directors, officers and other affiliated persons of Applicants are stockholders of Christiana or Du Pont or both companies. Therefore, it may be said that the proposed transaction would be in violation of Sections 17(a) and 17(d) of the Act unless an order of exemption is issued under Sections 17(b), 17(d) and 6(c) of the Act.

Synopsis of Proposed Merger Transaction

The proposed merger transaction is of such nature as to require evidence to demonstrate that the terms thereof (1) are reasonable and fair and do not involve overreaching on the part of any person concerned and (2) are on a basis that is not less advantageous for some of the participants than for others similarly situated.

Christiana has a limited portfolio of only four investments, of which one—a large block of Du Pont common stock—represents 98% to 99% of the total value of Christiana assets. In effect, Christiana common stock represents an interest, indirectly, in Du Pont common stock.

Christiana common stock is traded in the over-the-counter market in only limited quantities, and its market price consistently has been less than the market value of Christiana's underlying net assets. Over the past two years this market price discount has been in the range of 20% to 25%. Substantially all of Christiana's income consists of dividends on Du Pont stock, subject to tax at a current effective rate of 7.2%.

From time to time, Christiana has considered various means by which Christiana stockholders could be relieved of the foregoing disadvantages. In view of Federal tax

considerations discussed below, the only feasible method available to Christiana to achieve this objective is a tax-free merger into Du Pont. Accordingly, Christiana proposed to Du Pont that such a merger be considered.

Du Pont agreed to consider such a merger because of the possible advantages to it. Some corporate simplification would be achieved and there would be a broader market for Du Pont common stock by reason of the dispersion of the large single block of Du Pont common held by Christiana. In addition, considering the potential advantages to Christiana, Du Pont anticipated that it could obtain some financial benefit from the merger to provide Du Pont, overall, sound business reasons for the merger and an attractive proposal to present to its approximately 225,000 common stockholders (including some 60,000 Du Pont employees) for consideration.

Five directors of Du Pont also are directors of Christiana, and seven additional Du Pont directors own shares of Christiana common stock. These circumstances, together with the fact that Christiana is a major stockholder of Du Pont, indicated need for (1) all practicable safeguards to foster arm's-length bargaining and (2) extraordinary effort to be made to assure that the merger terms would be fair and reasonable for all parties affected. Accordingly, Applicants proceeded as follows—

1. Christiana and Du Pont each appointed a special committee of its Board to negotiate and submit recommendations with respect to the proposed merger. In the case of each company, the special Board committee consisted of two directors with no director, officer or employee relationship with the other company.
2. The special Board committees engaged investment banking firms as financial advisors to make inde-

pendent studies and recommendations regarding a suitable range of merger terms—Morgan Stanley & Co. to advise Applicants jointly in such respect; Kidder, Peabody & Co. Inc. to advise Christiana separately; The First Boston Corporation to advise Du Pont separately.

3. It was determined that Du Pont directors who also are directors of Christiana, as well as Du Pont directors who own Christiana stock, should not participate in discussion and decision of the Du Pont Board regarding the merger proposal.

Negotiations by the special Board committees were conducted with due consideration of the recommendations made by the financial advisors regarding ranges of merger terms they would consider fair and reasonable, and resulted in proposal by the special Board committees for a merger with terms thereof based on 97½% (i.e., a discount of 2½%) of Christiana's adjusted° net asset value. The proposed merger plan has been approved in principle by the Boards of each of the companies.

The 2½% discount as a basis for merger terms falls within the range recommended by each of the financial advisors, and each has expressed the opinion that the resultant merger terms are fair and reasonable for all parties affected. The effective rate of discount to be borne by Christiana stockholders, net of the portion of the discount they will recapture by reason of becoming direct stockholders of Du Pont, is 1.8%.

° As discussed hereinafter, certain of Christiana's assets, for the reasons indicated, have value to Du Pont lower than the amount reflected for such assets in determining the net asset value of Christiana. Christiana's net asset value was adjusted to reflect such assets at their value to Du Pont to arrive at an adjusted net asset value for purposes of determining the terms of the proposed merger.

The proposed merger terms are such as to provide Christiana stockholders shares of Du Pont common stock with current market value equal to 97½% of Christiana's adjusted net asset value in exchange for their Christiana shares. Each Christiana preferred share will be converted into Du Pont common stock having a market value of $120—the preferred call price. Each Christiana common share will be converted into 1.123 shares of Du Pont common stock and a contingent right upon settlement of a Christiana tax claim.

The following table summarizes selected data from Exhibit F regarding the effect of the proposed merger on stockholders of Christiana and Du Pont:

	% Increase (Decrease)		
	Christiana		*Du Pont*
	Common	*Preferred*	*Common*
Market value of security holdings	10.5%) 25.4 } °	20.0%	—
Dividend income	7.0	(47.7)	—
Earnings applicable to security holdings	75.8	—	0.4%

° Percent increase of 10.5% is based on market price discount for Christiana common prevailing at July 14, 1972, the last trading day before the date on which the proposed merger was approved in principle by Applicants' Boards; percent increase of 25.4% is based on such discount at April 28, 1972, the date on which merger discussions were announced.

Comprehensive description of the proposed merger transaction is in the following sections of this application.

Description of Christiana and Du Pont

Data regarding capitalization and stockholders of Christiana at June 30, 1972 are shown in the following tabulation:

Capital stock outstanding:	
7% cumulative, nonvoting preferred, $100 par value—106,500 shares	$10,650,000
Common, $1.25 par value—11,710,103 shares	14,637,629
Total	25,287,629
Earned surplus	70,086,421
Total capitalization	$95,374,050
Number of stockholders:	
Preferred	1,516
Common	6,683

The Christiana preferred stock is callable at $120 a share and is entitled to $100 a share in event of liquidation.

Security holdings of Christiana and book and market values thereof at July 17, 1972 (the date on which Applicants' Boards of Directors approved in principle the proposed plan of merger) are shown below:

No. of Shares	*Security*	*Value of July 17, 1972* Book Value	Market Value
13,417,120	Du Pont, Common	$74,621,915	$2,198,730,540*
16,256	Du Pont, $4.50 Pfd.	1,298,056	1,124,102*
69,216	Wilmington Trust Co., Common	903,592	2,699,424**
7,460	News-Journal Co., Common	846,107	24,260,000***
	Total	$77,669,670	$2,226,814,066

* Based on average closing prices on the New York Stock Exchange on July 10 through 14, inclusive.

** Based on average closing bid prices in the local over-the-counter market on July 10 through 14, inclusive.

*** Indicated fair market value based on appraisal by an expert in the field.

Du Pont stock held by Christiana represents 28.28% of the outstanding Du Pont common shares and .96% of the outstanding Du Pont $4.50 preferred shares. Wilmington Trust Co. stock held by Christiana represents 3.45% of the outstanding shares. The News-Journal Co. is wholly-owned by Christiana.

In addition to the security holdings listed above, Christiana has other assets consisting, at June 30, 1972, of (1) cash and cash equivalents, less current liabilities, in the net amount of $5,981,367 and (2) a claim for refund of Federal income taxes and interest, carried on the books as a deferred charge in the amount of $11,723,013. The claim for tax refund, amounting to approximately $21 million, principally involves a controversy as to the fair market value for Federal income tax purposes of the very large blocks of General Motors common stock received by Christiana in 1962, 1964 and 1965 as a result of the General Motors divestiture distribution by Du Pont.

Du Pont is a large industrial company engaged principally in manufacturing and selling diversified lines of chemical products and other products related thereto. Data regarding capitalization and stockholders of Du Pont at June 30, 1972 are shown in the following tabulation:

Capital stock outstanding:	
Preferred stock, without par value—cumulative:	
$4.50 Series—1,688,850 shares	$ 168,885,000
$3.50 Series— 700,000 shares	70,000,000
Common stock, $5 par value—47,566,594 shares (includes 120,784 Treasury shares)	237,832,970
Total	476,717,970
Amount paid-in, in excess of par or stated value	215,165,271
Reinvested earnings	2,512,791,463
Total capitalization	$3,204,674,704
Number of stockholders:	
Preferred—$4.50 Series	13,902
Preferred—$3.50 Series	4,854
Common	224,964

CIRCUMSTANCES LEADING TO MERGER STUDY

Market value of the large block of Du Pont common shares held by Christiana represents some 98% to 99% of the current value of Christiana's total assets and virtually all of Christiana's gross income consists of dividends paid on these Du Pont common shares. Over the years, there has been virtually no turnover in Christiana's portfolio, and Christiana has consistently followed the practice of declaring dividends on its common stock in an amount nearly equal to its net earnings per share of common stock. Thus, a holding of Christiana common stock represents essentially a holding, indirectly, of Du Pont common stock.

The common stockholders of Christiana could realize certain advantages by holding their interest in Du Pont directly, in the form of Du Pont common stock, rather than indirectly via ownership of Christiana common stock, as follows:

1. *Market value of the securities held would tend to reflect their full intrinsic value*—Christiana common stock has traditionally traded at a discount compared to the market value, at then current prices, of the net assets underlying the Christiana common stock. Over the past two years this discount generally has been in the range of 20% to 25%—and was 23% on April 28, 1972, when it was announced publicly that a possible merger would be considered. With the Christiana interest in Du Pont held directly by Christiana stockholders via ownership of Du Pont common, this market price discount would be eliminated.

2. *Securities held would be more readily marketable*—Christiana common stock is traded in limited volume in the over-the-counter market. Du Pont common stock has a broad quoted market on the New York Stock Exchange and more limited markets on other exchanges. In the first six months of 1972 weekly trading volume averaged approximately 87,000 shares for Du Pont common and only about 5,500 shares for Christiana common.

3. *Income would be increased*—Dividends paid by Du Pont to Christiana must be reduced by the Federal intercorporate dividend tax (currently at an effective rate of 7.2%) and other (relatively minor) operating expenses of Christiana before they can be passed on by Christiana to the Christiana stockholders.

Christiana has explored various possible means to achieve the foregoing advantages through methods that would eliminate Christiana as a corporate entity, or operate to reduce the magnitude of its security holdings, and place the Christiana holdings of Du Pont stock, or at least a substantial portion thereof, directly in the hands of the Christiana stockholders. The principal methods considered are described below:

1. *Exchange Plan*—A plan under which Christiana would offer its holdings of Du Pont stock in redemption of Christiana common stock was considered. Such an exchange plan is not practicable because it would require Christiana to pay substantial capital gains tax.

2. *Liquidation*—Stockholders of a company in an ordinary liquidation are subject to Federal tax at capital gains rates on the difference between the fair market value of the assets they receive and the tax basis of their security holdings in the liquidated company. In a so-called "one-month liquidation" under Section 333 of the Internal Rev-

enue Code, however, the stockholders incur an immediate tax only with respect to the portion of such gain that is not in excess of the company's accumulated earnings and profits as calculated for Federal tax purposes. Considerable attention was given to this possibility, but it was ultimately determined that a liquidation under Section 333 would not be feasible for Christiana.

3. *Tax-free Merger of Christiana into Du Pont*—Christiana concluded that this alternative is the only method reasonably available to it to achieve the objectives discussed above.

Christiana initiated the current merger discussions, stating the belief that (1) benefits from realizing improvement in market value and marketability of security holdings and elimination of intercorporate tax on Du Pont dividends may now outweigh the benefits derived from the holding of a large block of Du Pont stock by Christiana, and (2) a merger might be practicable on terms that would be favorable to both Christiana and Du Pont and the stockholders of both companies.

Christiana's proposal to consider a merger is of interest to Du Pont principally because it presents a possible opportunity for Du Pont to acquire the substantial block of Du Pont common now held by Christiana at a moderate discount from current market price in exchange for new Du Pont common shares valued at current market price, with resultant modest increase in Du Pont's earnings per common share. The merger also would provide advantage to Du Pont from (1) dispersion into some 8,000 separate holdings of the large single block of Du Pont common long held by Christiana, and (2) some corporate simplification (e.g., Du Pont no longer would be required to obtain prior exemption orders under the Investment Company Act of

1940 before undertaking certain types of commercial transactions).

DEVELOPMENT OF MERGER PROPOSAL.

Applicants have determined that there are mutual benefits to be gained from a merger, and Applicants have agreed to merge. The Board of Directors* of each of the companies has approved in principle a plan of merger on the terms described in this application and set forth in the draft Agreement and Plan of Reorganization attached hereto as Exhibit A.

Merger negotiations were structured with a view to ensuring, as completely as practicable, that the terms of any agreement to merge would be the result of arm's-length bargaining and free of conflicts of interest. Particular care in this respect was considered necessary not only because Christiana is a major stockholder of Du Pont, but also because five** of the eleven directors of Christiana are also directors of Du Pont and seven additional Du Pont directors are Christiana stockholders. Moreover, most of the Christiana directors own Du Pont stock.

Applicants' Boards of Directors each designated a special Board committee consisting of two of its members to negotiate and submit recommendations with respect to the merger. Christiana appointed to its committee Mr. A. Felix du Pont, Jr., a Vice President and director of Christiana, and Mr. Edward B. du Pont, an Assistant Treasurer and director of Christiana; neither of these persons has any director, officer or employee relationship with Du Pont. Du Pont appointed to its committee Mr. Charles

* Du Pont directors who also are directors of Christiana, as well as those who own Christiana stock, did not participate in discussion and decision of Du Pont's Board regarding the merger proposal.

** Walter S. Carpenter, Jr., Lammot du P. Copeland, Irénée du Pont, Jr., George P. Edmonds and Crawford H. Greenewalt.

B. McCoy, Chairman of the Board and President of Du Pont, and Mr. Irving S. Shapiro, a Senior Vice President and director of Du Pont; neither of these persons has any director, officer or employee relationship with Christiana.

Applicants considered it desirable that extraordinary effort be made to assure that the terms of any agreement to merge would be fair and reasonable for all parties affected. Accordingly, Applicants engaged independent financial advisors, none of which has an affiliation with either of the parties, to provide advice and guidance regarding the terms of the merger, as follows:

1. Morgan Stanley & Co., which firm is familiar with Du Pont and Christiana and has advised both companies on financial matters for a number of years, was engaged jointly by Applicants to advise both Du Pont and Christiana regarding appropriate merger terms. Report on the matter submitted to both Du Pont and Christiana by Morgan Stanley & Co. is attached as Exhibit B.
2. Kidder, Peabody & Co. Incorporated was engaged by Christiana to advise Christiana separately regarding appropriate merger terms. Report on the matter submitted to Christiana by Kidder, Peabody & Co. Incorporated is attached as Exhibit C.
3. The First Boston Corporation was engaged by Du Pont to advise Du Pont separately regarding appropriate merger terms. Report on the matter, and subsequent letter dated July 7, 1972 regarding the proposed merger terms, submitted to Du Pont by The First Boston Corporation are attached as Exhibit D.

A variety of factors that might be pertinent with respect to merger terms was considered by the independent financial advisors in their studies, as outlined in their reports, and by the special Board committees in the course of negotiations. But attention ultimately centered mainly on—

1. whether Christiana stockholders should receive Du Pont common stock with current market value equal to the current market value of Christiana's underlying net assets, or some lesser (or greater) amount to reflect a discount (or premium) from such net asset value; and
2. the volume of Du Pont common shares that could flow to Christiana stockholders without diluting Du Pont's financial position (earnings per share; dividends per share; etc.)—and, alternatively, the volume that could so flow and result in some modest improvement in Du Pont earnings per share.

The independent financial advisors recommended ranges of basic merger terms that they would consider fair and reasonable. Their recommendations with respect to basic merger terms, expressed in terms of % discount (or premium) from Christiana's adjusted net asset value, are summarized below:

	Recommended Range of Discount (or Premium)
Morgan Stanley & Co.	½% discount to 2½% discount
Kidder, Peabody & Co. Inc.	2% premium to 3% discount
*The First Boston Corporation	1.1% discount to 3.7% discount

* First Boston recommendation is stated in terms of the primary merger ratio (i.e., the number of Du Pont common shares to be exchanged for each Christiana common share). This tabulation reflects such recommendation translated to the equivalent in terms of % discount from Christiana's adjusted net asset value.

The special Board committees of Du Pont and Christiana had discussion with all of the financial advisors regarding the scope of their studies, factors considered, and ranges of merger terms they considered fair and reasonable. The special Board committees each received copies of the reports of each of the financial advisors. Merger negotiations then were undertaken by the special Board committees and agreement was reached that Christiana's adjusted net asset value should be discounted 2½% for purposes of the merger. Thus, the proposed merger terms are such as to provide Christiana stockholders shares of Du Pont common stock with current market value equal to 97½% of Christiana's adjusted net asset value in exchange for their Christiana shares. However, Christiana stockholders will have reduction of their equity interest only to the extent of about 72% of the amount of discount of Christiana's adjusted net asset value reflected in the merger terms—see below:

	Amount (dollars in millions)	*% of Adjusted Net Asset Value*
Discount reflected in merger terms	$55.6	2.5%
Portion recaptured by Christiana stockholders by reason of becoming holders of Du Pont	15.6	.7
Net reduction of equity	$40.0	1.8%

The Du Pont special Board committee considered merger terms reflecting a 2½% discount of Christiana's adjusted net asset value fair and reasonable for all parties affected, and appropriate in the circumstances to provide—

1. sound business reasons for Du Pont to undertake the merger and a basis for presenting to the approximately 225,000 Du Pont common stockholders (including some 60,000 Du Pont employees who are stockholders) a proposal that the stockholders, generally, would consider attractive and worthy of a favorable vote, and
2. some protection against the risk of possible loss to Du Pont upon sale of the News-Journal Company (see discussion on page A98).

The Christiana special Board committee considered such merger terms fair and reasonable for all concerned, in view of the significant benefits to the Christiana stockholders which would result from the merger and which are not realizable by Christiana in any other way.

The proposed merger terms fall within the range recommended by each of the independent financial advisors and each such advisor has stated the opinion that the proposed terms are fair and reasonable.

Adjusted Net Asset Value of Christiana

The net asset value of Christiana as used for purposes of the proposed merger is as follows:

Security holdings (see page A86 above)	$2,226,814,066
Cash and cash equivalents, less current liabilities	5,981,367
Deferred charge-claim for tax refund	11,723,013
Total net asset value	$2,244,518,446

This net asset value is computed on the same basis as the net asset value data reflected in Christiana's annual report to the Securities and Exchange Commission on Form N-1R,

except that security holdings are stated at market prices as indicated on page A86 and Christiana's cash and equivalents, less current liabilities, are stated as of June 30, 1972 —in accordance with agreement by Applicants as to methods of valuation for purposes of the proposed merger.

As discussed below, certain of Christiana's assets will not have value to Du Pont equal to the amount at which they are reflected in computing the net asset value of Christiana shown in the foregoing tabulation. Adjustments have been made to reduce such assets to their value to Du Pont in arriving at an adjusted net asset value of Christiana to be used for the purpose of determining the terms of the proposed merger.

Claim for Tax Refund

Christiana and Du Pont know of no reasonable method to determine at this time the fair value of Christiana's tax claim, because there is no way of predicting the amount, if any, that will ultimately be recovered with respect thereto. Therefore, the merger terms contemplate that the tax claim, together with $1,000,000 of Christiana's cash to be reserved to cover expenses to pursue the claim, will be treated at the time of the merger as having no value. The tax claim and related cash reserved for expenses will become the property of Du Pont on the effective date of the merger, but a Tax Claim Committee, consisting of the present directors of Christiana and successors thereof elected by those remaining in office to fill any vacancies, will be established to manage, with assistance of counsel and on behalf of the former Christiana common stockholders, matters pertaining to pursuit of the tax claim. Du Pont will not participate in decisions regarding litigation or other developments with respect to the tax claim. The Tax Claim Committee will have complete responsibility for all such decisions and full authority to dispose of the tax claim in any manner that it deems to be in the best interests of the former Christiana common stockholders.

Du Pont will use the funds reserved for expenses for payment of expenses incurred by the Tax Claim Committee. Upon settlement of the tax claim, any residue of such funds, together with funds equivalent to net proceeds from settlement of the tax claim, will be converted into Du Pont common stock having corresponding value and such shares will be delivered to an Agent appointed for the purpose. The Agent will distribute these additional shares of Du Pont common stock pro rata to the former Christiana common stockholders in proportion to the Du Pont common stock received by them in the merger transaction. The price for Du Pont common stock to be used for the foregoing conversion will be the average of the closing prices for Du Pont common on the New York Stock Exchange for the ten trading days preceding the date on which refund payment by the Government is received by Du Pont or, if no refund is to be received, the date on which judgment to that effect becomes final.

Any additional Du Pont shares must be delivered within five years from the effective date of the merger. If the tax claim is not settled within that period, Du Pont will negotiate in good faith with the Tax Claim Committee during the final 45 days of the five-year period to determine the then fair value of the claim. If agreement as to such fair value is reached, a distribution of additional Du Pont shares based thereon will be made at that time. If Du Pont and the Tax Claim Committee are unable to agree at that time on the fair value of the claim, the additional distribution will be deferred until ultimate settlement of the claim, and then be made in cash.

Cash and Cash Equivalents

As mentioned above, the merger terms contemplate that $1,000,000 of Christiana's cash will be reserved to cover expenses to pursue the tax claim. Also, both Christiana and Du Pont will incur certain expenses in connection with the proposed merger, estimated to total $1,500,000 as indicated below:

Professional fees (legal, financial advisors, etc.)	$1,150,000
Printing, mailing, etc.	350,000
	$1,500,000

The special Board committees have agreed that it would be equitable for Christiana and Du Pont to share the total estimated merger expenses equally. Accordingly, the net asset value of Christiana's cash and cash equivalents has been adjusted for purposes of the merger to reflect the reservation of the $1,000,000 related to the tax claim and $750,000 related to merger expenses.

Wilmington Trust Company and News-Journal Stock

Wilmington Trust Company is the trustee for the Du Pont pension fund and the Du Pont thrift plan and, in any event, Du Pont has no interest in maintaining an investment in bank stock. The News-Journal Co. publishes the only daily newspapers in Wilmington, Du Pont's headquarters city. Therefore, it is intended that Du Pont will hold these two investments for only the period required for orderly disposition thereof.

Based on data supplied by the financial advisors, the special Board committees estimated that expenses of disposal of the Wilmington Trust stock would amount to 3% of market value; the net asset value of this holding was adjusted for purposes of the merger to reflect this estimate.

No such selling expense with respect to the News-Journal is anticipated. The net asset values of the Wilmington Trust and News-Journal holdings were also adjusted for purposes of the merger to reflect a tax of 30% on the capital gains that would result from their sale at the values reflected for such assets for purposes of the merger.

Mr. Vincent J. Manno, an expert in the newspaper field, was engaged to appraise Christiana's holdings of the News-Journal; a copy of his appraisal is attached hereto as Exhibit E. Du Pont believes that it will have risk of possible loss upon sale of the News-Journal Co., considering that (1) potential buyers may not be willing to meet a sale price reflecting substantially full earnings potential, as anticipated by Mr. Manno, (2) conditions prevailing at the time of sale will have effect on the sale price obtained, and (3) Du Pont will have need to be selective, in the light of its overall community interests, to assure sale to a fully responsible buyer.

Total Adjustments

The adjustments described above may be summarized as follows:

Total Net Asset Value of Christiana (see page A95, above)	$2,244,518,446
Less Adjustments:	
Adjustment to reflect tax claim at no value	11,723,013
Distribution cost for Wilmington Trust (3% of market value)	80,983
Capital gains tax @ 30% on sale of:	
Wilmington Trust (tax basis = $903,592)	514,455
News-Journal (tax basis = $846,107)	7,024,168
Merger expenses (50% of estimated total expenses)	750,000
Cash reserved for tax claim expenses	1,000,000
Adjusted Net Asset Value of Christiana	$2,223,425,827

DESCRIPTION OF TRANSACTION.

The proposed plan of merger contemplates that the transaction will take the form of a statutory merger. On the effective date of the merger both classes of Christiana stock—preferred and common—will be converted into Du Pont common stock at the rates specified in the agreed-upon merger terms. The merger agreement will provide (as discussed above) that the holders of Christiana common on the effective date of the merger are contingently entitled to additional shares of Du Pont common stock upon ultimate settlement of the pending Christiana claim for tax refund.

The shares of Du Pont common used for the merger will be newly issued shares. The shares of Du Pont common and Du Pont $4.50 Preferred received from Christiana in the merger will be retired.

Christiana stockholders will be requested to surrender their certificates for Christiana stock in exchange for certificates for an appropriate number of Du Pont common shares. Dividends payable on Du Pont common after the effective date of the merger will not be paid with respect to any Du Pont shares represented by Christiana certificates not yet surrendered for exchange. Du Pont will hold funds for such dividends for payment when the Christiana certificates are surrendered.

No fractional shares of Du Pont common will be issued to the Christiana stockholders. Instead, Christiana stockholders having a fractional interest in a share of Du Pont common will be provided an opportunity, through an Agent appointed for such purpose, to (1) sell such interest or (2) purchase the additional fractional interest required to make up one full share.

Each of the independent financial advisors recommended that the Christiana preferred stockholders receive

Du Pont common shares with current market value equal to $120 per preferred share (the call price for the preferred) in exchange for their preferred shares. The current market price for the Christiana preferred is approximately $100 per share. Christiana desires that its preferred stockholders be given this treatment, and the proposed merger terms provide for exchange on such basis with the Christiana preferred stockholders. While there is a reduction in income to the preferred stockholders, those who are not satisfied with their Du Pont shares may sell them and reinvest the net proceeds. The Du Pont common stock to be exchanged for such preferred stock will be valued for purposes of the merger on the basis of the average of the closing prices for Du Pont common on the New York Stock Exchange for the ten trading days immediately preceding the effective date of the merger.

On the effective date of the merger the Christiana preferred stock will be converted into Du Pont common stock at the rate determined as described above (such rate is estimated at .7323 shares of Du Pont common for one share of Christiana preferred, based on current average price for Du Pont common, determined as described below) and the Christiana common stock will be converted into Du Pont common stock at the rate of one share of Christiana common for 1.123 shares of Du Pont common. For the purpose of computing these conversion ratios, Christiana was valued at 97½% of the adjusted value of its net assets as discussed above, and the Du Pont common stock to be issued to the Christiana common stockholders was valued at $163.875 a share, the average closing market price for Du Pont common on the New York Stock Exchange on the five trading days immediately preceding July 17, 1972 (the date on which the proposed merger plan was approved in principle by Applicants' Boards of

Directors). The number of additional shares of Du Pont common stock, if any, to be distributed to the former Christiana common stockholders upon settlement of the tax claim will be determined on the basis of the procedure described above on page A97.

The tabulation attached as Exhibit F shows the financial effect of the proposed merger terms on the Du Pont and Christiana stockholders.

The proposed merger plan has been approved in principle by the Boards of Directors of Christiana and Du Pont. Under the Delaware Corporation Law the merger will require the favorable vote of the holders of a majority of the total outstanding shares of common stock of each company. Christiana and Du Pont will arrange for special meetings of their stockholders, after obtaining the exemption order requested herein, for stockholder vote on the merger proposal, such vote to be subject to receipt of a ruling from the Internal Revenue Service that the proposed merger may be consummated on a tax-free basis.

Under Delaware Corporation Law, any holder of Christiana's preferred stock who objects in writing within the prescribed time may receive a cash payment equal to the appraised value of his preferred stock. No such right is available with respect to any Du Pont common or preferred shares or any Christiana common shares.

The merger will become effective at the time of the filing of the agreement of merger as required by Delaware law. At such time, Christiana's corporate existence will cease and an order of deregistration pursuant to Section 8(f) of the Act hereby is requested to become effective upon satisfactory demonstration to the Commission that all business activity pertaining to Christiana has been concluded and that, pursuant to Section 13(a)(4) of the Act, a majority of Christiana's voting securities has approved a

change in Christiana's business so as to cease to be an investment company.

Application is being submitted to the Internal Revenue Service for rulings to the effect that no gain or loss will be recognized for Federal income tax purposes to either corporation or to their stockholders as a result of the merger except with respect to (1) cash received by any Christiana stockholder in connection with his disposition of an interest in a fractional share of Du Pont common stock, (2) cash received by any dissenting preferred stockholder of Christiana who elects appraisal rights and (3) certain portions of any contingent distribution in connection with the tax claim.

Certain of the Christiana stockholders receiving shares of Du Pont common as a result of the merger may be restricted by the Securities Act of 1933 with respect to disposition of such shares. Appropriate arrangements as to registration rights for such stockholders will be made to afford them suitable liquidity with respect to their holdings of Du Pont common.

Statutory Standards.

The terms of the proposed merger, in Applicants' opinions, are reasonable and fair with respect to all parties affected by the merger and do not involve overreaching on the part of any person concerned. These terms were developed after comprehensive financial studies and examination of all the factors which Applicants and the three financial advisors considered relevant, under the circumstances, to a determination of merger terms for the two companies. Such factors included net asset value, expenses and taxes, earnings, dividends, market value and market discount.

The mutual benefits which Applicants and their stockholders will obtain from the merger may be summarized as follows:

Christiana.

Preferred stockholders—The market value of these stockholders' holdings will increase to the amount at which their holdings could have been redeemed. Redemption for cash at $120 per share could subject these stockholders to Federal capital gains taxes.

Common stockholders—These stockholders will (1) realize increased market value of their holdings resulting from the elimination of the market discount described above, (2) realize increased income resulting from the elimination of the intercorporate dividend tax on dividend income from Du Pont and (3) obtain a more readily marketable security, with attendant increased convenience in transactions involving their holdings.

Du Pont.

Common stockholders—These stockholders will receive a benefit from a modest increase in earnings per common share resulting from the discount reflected in the merger terms.

Du Pont Company—Du Pont will also gain the beneficial effects of a broader market for its common stock and the corporate simplification resulting from the elimination of Christiana and its large holding of Du Pont common stock.

Applicants submit that the proposed transaction would not be contrary to the Congressional purpose in

adopting the Act which, as expressed in Section 1(b) of the Act, is to prevent transactions adversely affecting the national public interest and the interest of investors. Applicants further believe that an order exempting the proposed transaction from the provisions of Sections 17(a) and 17(d) of the Act should be granted because:

1. the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;
2. the proposed transaction is consistent with the policy of the registered investment company concerned, as recited in its registration statement and reports filed under the Act;
3. the proposed transaction is consistent with the general purposes of the Act;
4. participation by officers, directors and affiliated persons of each of the two companies is on the same basis as that of all other shareholders similarly situated; and
5. the requested exemption order is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

It is therefore requested that an order of exemption be granted under Sections 17(b), 17(d) and 6(c) of the Act with respect to the proposed transaction.

This application is made by Christiana pursuant to action taken by the Board of Directors of Christiana on July 17, 1972:

"RESOLVED, that each officer of the Company is hereby authorized on its behalf to take all actions and to execute all documents necessary or desirable to the end that an Agreement and Plan of Reorganization, with a form of Agreement of Merger between this Company and Du Pont appended thereto, may be submitted in definitive form to this board for its action at a later meeting, and that there may be filed as promptly as possible after this meeting (a) an application to the Securities and Exchange Commission for such orders as may be required to permit the merger to be consummated and at an appropriate time to deregister the Company pursuant to Section 8(f) of the Investment Company Act of 1940, and (b) an application for a ruling from the Internal Revenue Service with respect to tax aspects of the merger."

This application is made by Du Pont pursuant to action taken by the Executive Committee of the Board of Directors of Du Pont on September 16, 1970 and approved by the Finance Committee of the Board of Directors of Du Pont on September 21, 1970:

"RESOLVED, that the Treasurer or First Assistant Treasurer, E. I. du Pont de Nemours and Company, each hereby is authorized and directed on behalf of the Company, to file with the Securities and Exchange Commission, U. S. Government, pursuant to the provisions of Sections 6 or 17 of the Investment Company Act of 1940, applications, and any amendments thereto or other documents that may be necessary or desirable, for orders of the Commission granting exemptions from the provisions of said Act.

"RESOLVED FURTHER, that the Secretary or any Assistant Secretary of E. I. du Pont de Nemours and Company each hereby is authorized and directed to affix the seal of the Company to any documents executed in pursuance of the foregoing resolution and to attest the same."

All requirements with reference to the filing of this application have been complied with and the officers of Applicants signing this application and filing the same are fully authorized to do so.

Applicants do not request a hearing in this proceeding.

Any questions or communications regarding this application may be directed, with respect to Christiana, to A. Felix du Pont, Jr., Vice President, Christiana Securities Company, Du Pont Building, Wilmington, Delaware 19898, with copies to K. W. Gemmill, Esq., Dechert Price & Rhoads, 1600 Three Penn Center, Philadelphia, Pennsylvania 19102 and with respect to Du Pont, to L. E. Grimes, Assistant Treasurer, E. I. du Pont de Nemours and Company, 1007 Market Street, Wilmington, Delaware 19898, with copies to C. V. Smith, Jr., Esq., Covington & Burling, 888 Sixteenth Street, N. W., Washington, D. C. 20006.

WHEREFORE, Applicants request that an order be issued by the Securities and Exchange Commission under Sections 17(b), 17(d) and 6(c) granting exemption from the provisions of Sections 17(a) and 17(d) of the Act to permit Applicants to consummate the above-described transaction. Christiana also requests that an order deregistering Christiana be issued under Section 8(f) of the Act, to become effective upon satisfactory demonstration to the Commission that all business activity pertaining to Christiana has been concluded and that, pursuant to Section 13(a)(4) of the Act, a majority of Christiana's

voting securities has approved a change in Christiana's business so as to cease to be an investment company.

DATED: Wilmington, Delaware, July 19, 1972.

CHRISTIANA SECURITIES COMPANY,

By /s/ EDWARD B. DU PONT,
Edward B. du Pont,
Assistant Treasurer.

Attest:
/s/ T. E. HOUSE,
Assistant Secretary.

E. I. DU PONT DE NEMOURS AND COMPANY,

By /s/ E. M. ROBINSON,
E. M. Robinson,
First Assistant Treasurer.

Attest:
/s/ S. A. Milliner, Jr.,
Assistant Secretary.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing application dated July 19, 1972, for and on behalf of Christiana Securities Company; that he is an Assistant Treasurer of such Company; and that all actions by the Board of Directors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ EDWARD B. DU PONT.
Edward B. du Pont.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 19th day of July 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing application dated July 19, 1972, for and on behalf of E. I. du Pont de Nemours and Company; that he is the First Assistant Treasurer of such Company; and that all actions by the Executive and Finance Committees of the Board of Di ectors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ E. M. ROBINSON.
E. M. Robinson.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 19th day of July 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C. 20549

AMENDMENT NO. 6

TO
APPLICATION DATED JULY 19, 1972, FOR AN ORDER EXEMPTING PROPOSED TRANSACTION BETWEEN CHRISTIANA SECURITIES COMPANY AND E. I. DU PONT DE NEMOURS AND COMPANY

PURSUANT TO SECTIONS 17(a), 17(b), 17(d) AND 6(c) OF THE INVESTMENT COMPANY ACT OF 1940
FILE NO. 812-3224

Christiana Securities Company	Du Pont Building Wilmington, Delaware 19898
E. I. du Pont de Nemours and Company	1007 Market Street Wilmington, Delaware 19898
(NAMES OF APPLICANTS)	(ADDRESSES OF PRINCIPAL OFFICES OF APPLICANTS)

The following information relative to potential impact on the market for Du Pont common stock as a result of the proposed merger is submitted by way of Amendment No. 6 to Application in this matter dated July 19, 1972.

In the course of the merger negotiations the Special Board Committees of Du Pont and Christiana considered the possible immediate and longer term effect of the

merger transaction on the market for Du Pont common stock, and discussed this aspect of the transaction (including the comments thereon in their reports filed as exhibits to this Application) with the financial advisors. The financial advisors indicated that, in their opinions, there would be no significant or prolonged adverse impact on the market for Du Pont common stock. Pertinent factors relevant to such discussions and conclusions are summarized below:

1. More than 50% of the oustanding shares of Christiana common stock are held of record by Wilmington Trust Company in various fiduciary capacities, principally in trust for the benefit of several hundred individuals and institutions. In addition, a number of individuals hold of record substantial quantities of the shares. Generally, these holdings in trust and directly by the individual stockholders have existed for many years and are in the nature of a long-term investment in the Du Pont Company via stockholdings in Christiana.

Persons owning Du Pont common stock make their own decisions as to sales of such stock; however, Applicants know of no reason to believe that, upon shift of their long-term investments by reason of the merger from an indirect interest in Du Pont via holding Christiana common stock to a direct holding of Du Pont common stock, there would be any tendency for a large portion of such Du Pont common stock to be sold by such stockholders. Moreover, the tax basis for the Christiana shares held by such stockholders generally is very low (zero in many cases) due to the impact of the divestiture of General Motors stock by Du Pont and Christiana in the 1960's. As a result, the potential tax effects of sales of such shares represent a substantial deterrent to sales by such stockholders of Du Pont common stock received by them in the merger.

2. The directors of Christiana and certain other stockholders of Christiana may be deemed within the meaning of the Securities Act of 1933 and Regulations thereunder (1933 Act) to be "affiliates" of Christiana. As a result, such persons will be restricted by the 1933 Act with respect to disposition of shares of Du Pont common stock received by them in the merger. Du Pont has determined that it will treat Wilmington Trust Company as so restricted with respect to disposition of certain of the shares of Du Pont common stock it receives in the merger.

Based on information currently available, it is anticipated that approximately 70% of the Du Pont common stock to be issued in the merger transaction will be subject to the foregoing restrictions, which will prevent their sale to the public other than pursuant to an effective registration statement filed under the 1933 Act or in "brokers' transactions" as defined in the 1933 Act.

The applicable restrictions will be specified in agreements to be entered into between Du Pont and each stockholder of Christiana who will receive such restricted stock. These agreements will provide for restrictive legends to be placed on cer-

tificates for shares issued to such stockholders in the merger, and will further provide that such legends may be removed only to permit sale of such shares pursuant to an effective registration statement filed under the 1933 Act or upon receipt of an opinion of counsel satisfactory in form and substance to Du Pont that registration is not required under the 1933 Act to permit sale of such shares.

Certain registration rights will be afforded to the stockholders under these agreements, limited so as to permit registered sales of restricted shares only 1) during the months of April and October of each year in any lawful manner other than a firm commitment underwritten offering and 2) at one other time during each year in a firm commitment underwritten offering of at least $25 million in then current market value of such shares. No other public sales of the restricted shares would be permitted, except in "brokers' transactions" as defined in the 1933 Act, which transactions may not exceed, for any person in any six-month period, approximately one week's reported trading volume in Du Pont common stock. Applicants believe that these limitations on public sale assure that any public sales of Du Pont common stock to be issued in the merger would occur in an orderly fashion without significant or prolonged adverse impact on the market for Du Pont common stock.

This Amendment is filed pursuant to authorizations contained in the Application (page 23—File No. 812-3224) which authorizations are applicable to the respective

officers signing this Amendment on behalf of the Applicants and are still in effect.

DATED: Wilmington, Delaware, October 27, 1972.

CHRISTIANA SECURITIES COMPANY,

By /s/ EDWARD B. DU PONT,
Edward B. du Pont,
Assistant Treasurer.

ATTEST:

/s/ T. E. HOUSE,
Assistant Secretary.

E. I. DU PONT DE NEMOURS AND COMPANY,

By /s/ E. M. ROBINSON,
E. M. Robinson,
First Assistant Treasurer.

ATTEST:

/s/ THOMAS B. FARROW,
Assistant Secretary.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing amendment dated October 27, 1972, for and on behalf of Christiana Securities Company; that he is an Assistant Treasurer of such Company; and that all actions by the Board of Directors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ EDWARD B. DU PONT.
Edward B. du Pont.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 27th day of October 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing amendment dated October 27, 1972, for and on behalf of E. I. du Pont de Nemours and Company; that he is the First Assistant Treasurer of such Company; and that all actions by the Executive and Finance Committees of the Board of Directors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ E. M. ROBINSON.
E. M. Robinson.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 27th day of October 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

—

APPLICATION UNDER SECTIONS 17(b), 17(d), AND 6(c) AND RULE 17d-1 FOR AN ORDER EXEMPTING TRANSACTIONS BETWEEN AFFILIATES PURSUANT TO A MERGER.

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

———

APPLICATION OF LEWIS C. MURTAUGH TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56 FOR LEAVE TO INTERVENE AS A PARTY PURSUANT TO RULE 9(e).

Lewis C. Murtaugh, trustee for Emanuel and Helen Steib under Declaration of Trust dated August 30, 1956, applies to the Commission for leave to intervene as a party in the above matter, for the reason that his participation as a party will be in the public interest and because leave to be heard pursuant to paragraph (C) and (D) of Rule 9 will be inadequate for the protection of his interest as holder of 400 shares of common stock and the interest of all the common stock holders of E. I. Du Pont De Nemours and Company.

In support of this application the following considerations are submitted:

1. Applicant is an Attorney at Law Licensed to practice in the State of Illinois since 1930 after graduating that year from Harvard Law School. He is also licensed to practice in the United State Supreme Court and the local United States District Court and the Seventh Circuit Court of Appeals, as well as the Tax Court and the Court of Claims. His general field of practice includes corporation law, including some derivative, class action and Rule 10 (b)(5) litigation. He taught corporation law for one year as an accommodation to his friend, the then Dean of Loyola University Law School in Chicago. These credentials are recited not that they are so impressive but to warrant the expectation on the part of the Commission that applicant has the capacity to comprehend and contribute to the resolution of this matter.

Applicant has had no experience in appearing before the Securities and Exchange Commission, but feels confident that he can deal with the legal and factual issues as to what is fair and reasonable and not overreaching, as he has met these issues numerous times in the course of his practice.

2. Applicant has attached hereto as Exhibit A copies of the following instruments sent to the Securities and Exchange Commission.

1. REQUEST FOR A HEARING AND ADVICE dated October 25, 1972.

2. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated October 31, 1972.

3. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated November 14, 1972.

The contents of said Exhibit A are here incorporated by reference and the substance of the points made thereby

are here reiterated in the filing. Financial journalists have indicated in their articles that Exhibit A was a prime reason that a hearing has been called.

3. If minority interests are to be heard it is essential in this situation that intervention by responsible minority groups or persons should be allowed. The Securities and Exchange Commission staff representative indicates that the Commission does not plan to offer evidence, investigate the issues raised or participate actively. Some one or more persons with the right of a party as provided for in Rule 9(e) are indispensable.

4. As I read the Rules, only parties have the right to present oral and documentary evidence and to conduct cross-examinations [Rule 14(a)] or to ask for subpoenas for witnesses [Rule 14(b)] or to take depositions for discovery or otherwise [Rule 15(a)] or to submit interrogatories [Rule 15(g)] or to file a petition for a review [Rules 17 & 26] or to make oral argument before the commission [Rule 21(a)]. While the rulings of the Commission as to fact if supported by substantial evidence are not vulnerable on appeal it is the evident intent of Section 42 of the Investment Company Act to qualify this if all evidence is not considered, which would surely be the case if this applicant is denied the rights of a party and someone else doesn't come forward to do what he intends.

5. Here are some of the matters as to which discovery or information is sought:

a. A further breakdown of shareholders of Christiana to identify as classes.

1. The total number of Associates according to SEC regulations.

2. The total number of shares which would be added to this group if persons, second cousins or closer (by blood or affinity) to the common directors not included in #1 were included as if as an SEC associate.

b. Copies of pamphlet list of 40 individual shareholders of Christiana and their holdings.

c. Information which DuPont or Christiana has as to the bases for gain & loss of the 334 shareholders of Christiana (Sec. P6 of Exhibit 2 of Morgan Stanley study) who hold 1,000 shares or more which constitutes 95.5% or 11,183,194 shares out of 11,710,103 shares outstanding.

d. Even if the company doesn't have the answer to (c) we ask a table showing figures for all Directors with du Pont blood and their brothers and sisters and the descendants of their grandfathers (intended to find out extent to which low bases might deter sales). Any information on this point is requested.

e. What was the basis of Christiana shares per share as finally determined in the estate of Irénée du Pont who died in 1963 and what was the market value of Christiana and General Motors at the time of his death.

f. Please give the same information as asked in Question F as to estates of any other persons of du Pont blood holding 5,000 shares or more who died in the last 15 years.

Alternatively, if not available, given the dates of death, the number of shares (if over 1,000), and the names of executors and site of administration.

g. Copies of opinions, reports and data furnished by Morgain Stanley & Merrill Lynch in relation to the asserted deficiency and claim for refund and the suit involving Christiana and the government (now pending in Delaware).

h. Copies of all material other than described in G furnished to the government in connection with matters described in G.

i. Copies of the Record, including transcript before Judge LaBuy below and briefs in the United States Supreme Court, October terms, 1960, 366 U. S. 316. The relevance is set forth in Exhibit B attached hereto.

j. Copy of final order of Divestiture entered by Judge LaBuy.

k. Copy of material submitted before congress and congressional report on tax relief bill also a citation or reference to where the law and report can be found.

l. Copies of Annual Reports of DuPont and Christiana from 1960 to date also of any special reports dealing with General Motors shares of DuPont or Christiana. Include offers of exchange of General Motors for DuPont or Christiana shares.

m. Copies of all communications to Christiana shareholders about the DuPont merger and the restrictions on shares to conform to the Security Act and of all papers and data showing restricted shares and status of same at this time including copies of restrictions.

n. Other material may be sought from others (e.g. about the Henry F. du Pont Tax Court case described in Exhibit A(3)).

o. The mailing address of each director of DuPont and Christiana.

p. Copies of minutes of all meetings of directors and shareholders of Christiana and DuPont which contain any reference to the merger and of all special subcommittee meetings and all written material, relating to the merger (include financial advisors material).

q. All material relating to selling intentions of Christiana shareholders or selling schedules, proposed broker's sales or private placements.

r. The names of the persons responsible for the opinions of the three financial advisors and of Merrill Lynch's and Morgan Stanley's opinions in the tax refund matter.

s. What will be the total holdings of DuPont *proforma* of du Pont family and related interest as defined with annual reports after the merger (to test the extent of the assumed advantage of getting out from under the family thumb).

Obviously no mere participant can do the job that needs to be done, especially since the staff of the Commission seems to be more or less neutral. This I much regret, since their capability when roused against insider profit-reaping is renowned. The attitude seems to be that nothing can be too bad if it is fully disclosed. Obviously the iron grip Christiana and the du Ponts have on DuPont make disclosure more or less incidental, which is why the Investment Company Act of 1940 was passed. There's such a thing as being perfectly candid, even persuaded you're right, and still being unfair, unreasonable and overreaching. However, there is an aura of Rule 10(b)(5)

violation here in the hush-up of the market effect issue which was not mentioned in the application, consequently not in the notice sent out digesting the application, nor in the prospectus as presently proposed.

6. There are difficulties in opposing the wills of people who have billions so as to make the six or seven figure cost of the program they promote mere chickenfeed. This is especially true when there is a half billion dollar windfall tax free in the project of voting both companies shares for the benefit of the shareholders of one and the detriment of the shareholders of the other.

On the other side, to put it optimistically, it is quite uncertain that time spent or expenses incurred or even results accomplished in opposition will be recognized financially. Therefore frugality is indispensable. Another point is the support of prestigious financial advisors enlisted by Applicants. Now, these advisors did not, as pointed out in Exhibit A(2), deal with the effect on the market for DuPont shares; but still they are obviously allied with the Applicants. Their names would cow almost any other people in the securities industry. If these leaders, who control a major part of all underwriting in the nation say, "Black is grey" anyone in the industry who says "Black is black" might well view his future apprehensively, or possibly say "Our second thought, black is grey." Call it club spirit, fraternalism, cronyism or caution, the industry leaders who stood in line to fill the record in the DuPont-General Motors Case (see Exhibit 2 hereto) to prove the points I am making will not be heard from in this vein here.

7. There is an implied invitation to add matters and questions for consideration at the hearing. I gladly do so realizing that some, but far from all, may be within the scope of what is suggested in the order for a hearing,

though, in my opinion all of them should be. I also suggest my present view of the answers which might be modified after a hearing, but which I hope to elaborate on, if not modified.

a. Q. Should there be a merger?
   A. Probably not.

b. Q. What is the synergistic value to each merging side of the combination?
   A. Great for Christiana. It becomes part of a vital operation rather than a mere conduit. For DuPont sterile is the word. Nothing to raise expectations, to vary operations, to add profit (a couple of cents added to earnings is laughable).

c. Q. Who gets the better grade of security as a result of the merger?
   A. Christiana. It gets 1 & ½ blue chips for every red chip it turns in; and it gets the blue chips out to its shareholders tax free. The chips both had established values in the market place and a half billion dollars is added to the value Christiana shareholders had, which is made possible by their control of DuPont.

d. Q. Were Christiana shares underpriced in the market before the merger?
   A. No. Their price compared favorably with similar securities. A potential exploitation of the DuPont interlock may have enhanced it.

e. Q. Are either sides' shareholders benefited by the merger?
   A. Only Christiana's.

f. Q. Were the merger terms what parties truly free to bargain at arms length, in their own interests, including not to merge, would agree to?
A. No.

g. Q. To what extent does the merger give a premium from the party suggesting it, and benefiting from it, and controlling the terms and the decision whether or not there will be a merger?
A. A minus extent. Usually a party seeking a merger offers a premium of 15% to 25%. Here DuPont, the courted, makes possible a premium of 33%. Added to say 17% normal premium from a suitor, a 50% deviation from normal is being given for the pleasure of their non-company. (But, then, this a shotgun wedding.)

h. Q. Are either sides' shareholders hurt by the merger?
A. Only DuPont's.

i. Q. Will the newly marketable shares of DuPont help or hurt the price of DuPont shares generally?
A. There are nothing but bearish aspects to this situation.

j. Q. To what extent do the merger terms provide a factor to counteract the negative factors for DuPont shareholders?
A. None. The 2½% (1.8%) factor was not represented to be anything in the counteracting of disadvantages, only a justification for co-

operation in a situation without disadvantages.

° ° °

The status of a participant simply will not afford the stockholders of DuPont the protection they need. Enclosed as Exhibit C is a copy of a letter I wrote on November 22, 1972, on the simplest of matters. It still has not been answered, though acknowledged. A fair conclusion is that this is total war. Two sides are needed. Respectfully I must advise that if denied the right to intervene as a party, I will of course be a participant, but will also seek an interlocutory review of the order denying intervention.

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
LEWIS C. MURTAUGH, TRUSTEE FOR
EMANUEL AND HELEN STEIB
UNDER DECLARATION OF TRUST
DATED 8/30/56.

Lewis C. Murtaugh, Trustee
141 W. Jackson Blvd., Room 2650
Chicago, Illinois 60604
312/939-2880

Exhibit A to Lewis C. Murtaugh

Application to Intervene

A1. REQUEST FOR A HEARING AND ADVICE dated October 25, 1972.

A2. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated October 31, 1972. 5 pages before Exhibit A3

A3. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated November 14, 1972. Last 4 pages

[Letterhead of]

MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

October 25, 1972

Mr. Ronald F. Hunt, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

In Re: 812-3224
Application of Christiana Securities Company and E. I. DuPont de Nemours Company

REQUEST FOR A HEARING AND ADVICE

Dear Mr. Hunt:

The undersigned, Lewis C. Murtaugh, is the holder as Trustee of 400 shares of the common stock of DuPont, and has several clients, including his wife, who own several thousand shares. (His wife, Mary Imelda Murtaugh, owns 1,350 shares.) By a communication dated October 4, 1972, and postmarked October 5, 1972, he was first advised of proposed merger terms of Christiana into DuPont, whereby shareholders of Christiana would receive 1.123 shares of DuPont for each Christiana share. Upon return from a four week trip abroad on Friday, October 13, 1972, when the communication first came to his attention, the undersigned immediately wrote DuPont and the S. E. C., a copy of which letter is attached as Exhibit "A".

On Monday, October 16th, the next business day, an official of the S. E. C. called to advise that his only suggestion was to inspect the files at the S. E. C. library. His information indicated that a proxy approval was going forward simultaneously, contingent, of course, on S. E. C.

approval of the proposed merger terms in accordance with the Investment Company Act of 1940.

Not having heard from DuPont by Wednesday, October 18th, the undersigned purchased an airline round-trip ticket for Thursday. He spent the day (October 19th) in the S. E. C. library, read the entire file, photocopied some pages, and made notes. Returning to the office Friday, he found that an officer of DuPont had called while he was in Washington and told the switchboard girl he would be glad to fill me in with details. This call was six days after my letter and possibly was due to institutional drag, but also possibly to the serious concern the undersigned had expressed in Chicago as to the reasonableness of the merger terms, which quite possibly filtered back to Wilmington.

In any event an offer on Thursday, even if it included a copy of the filing to be sent the undersigned, such material would not have been received until Tuesday, October 24th (October 23rd was a mail holiday), hardly time to meet the October 27th deadline set by the S. E. C., a fact stressed in my letter (Exhibit "A"). Even devoting 10 hours a day, the shortage of time prevents this presentation from being as well organized or supported as the half billion dollar issue warrants. But, to get to the heart of the matter.

1. Mr. McCoy's Covering Letter Vitiated the S. E. C. Notice.

Comparing the three page S. E. C. notice with Mr. McCoy's covering letter of October 4, 1972, it is noted that Mr. McCoy states that a copy of the S. E. C. notice is enclosed "for your information", a sedated form of indicating that keeping shareholders advised was all that was involved, rather than letting them know they were to have

a chance to express themselves in this murky conflict of interest situation where DuPont family interests controlled both sides and were garnering over $500,000,000 in a five month rise in Christiana quotations from the merger for the shareholders of Christiana, largely themselves and family. Since the company itself had the complacency, presumption or shrewdness not to request a hearing, if the shareholders could be lulled into not requesting one, no fresh air could ever ventilate the situation. Certainly, this is the very situation Congress envisioned in passing the Investment Act of 1940.

I should add that Mr. McCoy's covering communication went on to further soothe that "the stockholders of the DuPont Company are not required to take any action with respect to the proposed merger at this time". Never a word about the fact that they were priviledged to submit objections or request a hearing, or seek the production of more information, or a more penetrating analysis of the market effect of releasing 13,000,000—or 28% of DuPont shares previously off the market upon the stabilized price relationship based on only 72% of DuPont shares being available. The very purpose of the notice was contrary to Mr. McCoy's innuendo that stockholders should ignore the S. E. C. notice and the effect was to negate the Congressional intent in passing the Investment Act of 1940. Then follows the illusion of recourse, action at a stockholders meeting where the DuPonts and Christiana make voting meaningless (all as recognized in the 1940 Act).

2. There Was No Reason, Absent an Anticipation of a Conflict of Interest Transaction Beyond Imagination, to Assume the Market Value of Christiana Shares Was Not a True Index of Their Value.

It would seem that the S. E. C. notice could have been more objective if it had qualified or omitted the fact that

Christiana common was "traded in the over-the-counter market in only limited quantities", as if this was the reason or more than a minor part of the reasons "its market price consistently has been less than the market value of Christiana underlying assets". It would seem that the Company's hook, line and sinker approach was swallowed by whoever passed on this inference (or judgment) so unqualifiedly.

Contrariwise, the stock trading in Christiana was not inconsiderable, considering 56% was tied up in trusts and bore a reasonable relation to many listed stocks.

This stock has been on the market for possibly 40 years. When DuPont was recommended, it too was in many "buy" recommendations and sometimes with a comment about the discount from DuPont. To attribute the discount to a thin market is to magnify an element in the combination of ingredients to the exclusion of all others. The market has had over a generation to know DuPont and Christiana and to buy all it wanted. Investment analysis has been lavished on this situation. To ignore market evaluation of the existential relation of DuPont and Christiana is to obscure the truth, which has been searched for and found by investors and their advisers over a span of decades. Does any one doubt that over a period of several years, hundreds of millions of dollars of Christiana could have been picked up on the offer side of the over-the-counter market without haggling between bid and offer for less than DuPont? In fact, what a splendid thing it would have been for DuPont, itself, to have bought every time Christiana declined 20% below DuPont.

The only thing the wise and careful analyst did not anticipate was the impossible concept of a tax free exchange by DuPont with Christiana shareholders on the basis now suggested. Even when the announcement of the consideration of the idea of merger was made in April,

the financial community did not evaluate Christiana shares for the next three months at above DuPont, until in July when the amazing proposal was adopted by the interlocking directorates, controlled by the DuPonts. All the figures were there for any analyst or investor. No one, but no one, apparently conceived the monumental courage or gall would be to trade on such a premium to Christiana shareholders, as proposed.

3. Market Value of Christiana Cannot Be Ignored and Asset Value Substituted Just Because DuPont as a Corporation Is Not Raided.

In *Texas Gulf Sulphur*, the company was not raided either. Just certain shareholders in relation to other shareholders. The essential point there and here is insider benefit. Here, however, the insiders were already in, and are proceeding with a certain amount of candor to establish the point, as bait, that DuPont per book is getting a minuscule advantage, which supposedly filters by osmosis out to its shareholders, while, *mirabile dictu*, half of a billion is created out of nowhere and funnelled unfiltered into the pockets of controlling interests, without any real detriment to DuPont shareholders.

There is a principle of logic "Everything that exists has a sufficient reason for its existence or mode of existence.". Also a principle of conservation of energy. This suggests that newly existing one-half of a billion dollars cannot be given to 28% of DuPont shareholders without in the long, short, or intermediate run coming out of the values of the remaining 72% of shareholders. The colossal bonanza was not created. It was in large part diverted by casuistry of the most demonstrable sort. "Things equal to the same things are equal to each other"; ergo—a share of DuPont owned by Christiana is the same thing as a share owned by a non-Christiana shareholder or a shareholder

of Christiana owns the same thing as a shareholder of 1.15 shares of DuPont.

The fallacy of the presentation is the categorical assertion at page 9 of the S. E. C. filing and elsewhere:

> "A holding of Christiana common stock represents essentially a holding, indirectly, of DuPont common stock".

This is not true, either essentially or indirectly, though if the words "superficially" were substituted for "essentially", it would be closer to the truth, especially if for "indirectly" were substituted "irrelevantly". The essential difference will be discussed hereafter, what might be called the existential difference is the relation of 72% of shares to the total public market and the absence of 28% from it, and the changes to be expected from the new proposal.

The record is incomplete. The whole issue is the effect on the other shareholders not on the company as such and the distinguished financial houses hardly touched on this, and certainly show no data was provided or analyzed, and the company filing with the S. E. C. is silent, as if the only interest DuPont shareholders could have was not in their own values as owners of freely tradeable shares but in the company's net worth per books.

There has been no adequate presentation on this point but only disclosure in terms of $45.00 advance over market for Christiana shareholders without aggregating in terms of a half billion dollars, the colossal disparity in advantage flowing to the controllers of DuPont. Indeed, the whole presentation to the S. E. C. including the incomplete investigation by prestigious investment houses virtually ignores this point and present no sign it was seriously considered. This is especially noteworthy since DuPont, itself, sponsored voluminous evidence in the General Motors

divestiture Case (*U. S. v. DuPont and General Motors, Trade Cases, 1959, ¶ 69461*) and no doubt before Congressional committees on the impact of a relatively smaller block of released stock on General Motors stock prices. It even secured special legislation. One expert, IRWIN FRIEND, testified on the effect of added existing stock to the market. The Court said "Dr. Friend agreed that there had never been anything in the past comparable to the sales contemplated by the Government plan.". He also testified that an increase in the supply of stock of 10% had in the past brought about a decline in price of 5%, that an increase of 20% had been associated with price declines between 10% and 15%.

As will be argued hereafter, the market price of Christiana shares was a true index of their value partly because its DuPont was not on the market. But the point here is the market price of the 72% other shares was based on this supply of DuPont shares being on the market. Adding 28% more shares, 13,000,000 plus, to a stabilized supply and demand situation could not fail to destroy the balance forty years had solidified. Nor is DuPont's recent market performance or earning dynamics such that a swelling demand is being generated to swallow such an influx without an effect on prices of DuPont shares.

Whether this is true or not cannot be determined from the filing's supporting opinions which are geared entirely to the effect on DuPont as a company, and not on the prices of the shares as affected by the release of 13,000,000 added shares in a market stabilized on the basis of their not being available.

Even if the Wilmington Trust Company and the DuPont directors kept their newly distributed DuPont shares, over 10% of DuPont would be distributed to 7000 or so other Christiana holders. This would indicate a

$230,000,000 market loss to other DuPont shareholders according to DuPont's witness, Dr. Friend.

Surely, Wilmington Trust Company is longing to diversify its trust portfolios. If, however, it kept a third of its distributed DuPont the remainder of its DuPont would be another 10% on the market, which Dr. Friend's testimony indicated would cause price declines of 10% to 15%, or 470 million to 700 million. This is a figure quite remarkably similar to the largesse Christiana shareholders are getting.

In sum, no adequate inquiry or report of selling intentions or the market effect of selling is in the record and the approval of a merger, especially on the terms sponsored by the interlocked Directors is incomplete, without full consideration of this point. For other evidence on the general subject of adverse price effect of added shares to the market, see the evidence of Gordon in the *F. C. C. case A. T. & T. Co., Docket No. 16,258 (1968).* And, generally, as supporting the same thesis, see James C. Bonbright, *Principles of Public Utility Rates* (New York: Columbia University Press, 1961); *United States v. E. I. duPont de Nemours and Company, General Motors Corporation, et al., Trade Cases* (Chicago: Commerce Clearing House, 1959), par. 69,461; David Durand, "The Cost of Capital, Corporation Finance, and the Theory of Investment: Comment", *American Economic Review 49* (September 1959), 639-55; and Douglas Vickers, *The Theory of the Firm: Production, Capital, and Finance* (New York: McGraw-Hill Book Co., 1968); also John Linter, "Dividends, Earnings, Leverage, Stock Prices, and the Supply of Capital to Corporations", *Review of Economics and Statistics 44* (August 1962): 243-69. (SEE FOOTNOTE [1] BELOW.)

[1] Please note the confirmatory evidence of Christiana, Irénée du Pont, Jr., Morgan Stanley and Merrill Lynch contained in Exhibit "B" received too late to be included in the text at this point.

4. THE FINANCIAL BENEFIT TO DUPONT SHAREHOLDERS IS NEGLIGIBLE.

Dealing with what would be generally considered sizeable companies, a $40,000,000 favorable adjustment of allocable interest in a company's net worth might not be insignificant. With DuPont, however, it means corporate net worth per book is divided not into 47,566,694 units per share, but only into 47,377,500 units, an increase in unit of .004 or sixty cents in terms of the market value of a share buried where DuPont shareholders cannot get at it and the market will disregard it, as compared with around $40.00 apiece extra in hand to each Christiana shareholder.

While $40,000,000 per book, not added to DuPont's earnings but merely divided into almost indescribably small units, may "provide sound business reasons" for DuPont to present its insiders with 500 million, DuPont's outsiders are justified in being skeptical and respectfully to inquire if in fact they are not making an unwitting contribution, and to seek thorough and documented assurances on this point.

5. REASONS OTHER THAN A THIN MARKET THAT CHRISTIANA WAS WORTH LESS AND SOLD AT A DISCOUNT FROM DUPONT.

a) The currently effective tax rate of 7.2% on dividends received meant that for each five dollars, DuPont shareholders received, Christiana had for distribution to its shareholders for its 1.15 shares of DuPont, only $5.16 before administration expense. Such expense probably legitimately absorbed the 16 cents (unless DuPont footed the bill). The excess of .15 per share of DuPont in Christiana assets was virtually

useless for producing an income advantage over DuPont.

b) A company whose sole assets consists of the shares of another company's shares are intrinsically worth less than the shares of the other company. Apart from the dividend tax, the holding company does not share in the operating income of the other company, can only benefit from dividends and cannot accumulate net worth.

c) If the operating companies values increase, the holding company must pay a tax on the increase of its shares if it sells, it and its shareholders must pay again at ordinary income rates on the dividends that distribute the profits. All other things being equal, no one would equate a holding of 2000 shares of a marketable stock with the ownership of a company whose sole asset was 2000 shares of such operating company's stock.

d) The individual situation here was enlarged on in another aspect heretofore. Although not clearly enough stated, the shares of DuPont Christiana held were virtually frozen. These shares were not owned by Christiana shareholders, but were a single block completely indigestible by the market. The blockage defect so often projected by DuPont has been heretofore referred to.[1]

e) All knew that Christiana held a negligible basis and if it sold its net asset value would be reduced by 25%, possibly more. Forty years of appreciation remained to be paid for by any new Christiana investor, plus a tax to get it out.

[1] And also by Christiana in its claims and suit against the United States for a tax refund. See Exhibit "B" attached hereto, which is very relevant at this point.

f) It is not suggested this list is complete, but time requirements prevent deeper analysis and exposition.

In buying Christiana, therefore, one bought DuPont with built-in impediments, which, more than the limited market, account for the discount at which it sold.

The indications are that the three financial houses referred to were told there was going to be a merger—no question of that. Each then settled on a net asset value approach for Christiana, and a market value approach for DuPont, which is equating unlikes. The vast investment of DuPont in facilities and research, the cash flow, its financial conditions, no U. S. long term debt, and many other advantages which time forbids defining, are swept under the DuPont price rug, while all the barnacles are meticulously scraped off the Christiana and Christiana's DuPont shares.

In fact, in the S. E. C. filing (p. 9), the company frankly states that a modest increase in DuPont earnings per share were what attention centered on. "Seek and you shall find". This goal was brilliantly achieved. Between 1 and 3 cents a share extra in earnings will result for DuPont shareholders. Seldom has modesty been so scrupulously observed.

6. THERE WAS NO ARMS-LENGTH CONSIDERATION HERE.

Forgetting all the reasons why this transaction is affirmatively unfair to outsider DuPont shareholders, we reach another point.

If A owns property which it would be of advantage to B to own, or which could be so rearranged that B's value would be substantially increased, is there anything unfair

if A seeks part of the advantage, even assuming (contrary to fact) A was not disadvantaged.

Many Americans, much less aggressive than David Harum, would think in this setting it was reasonable to gain something more than a tip, and A's reasonably aggressive independent sub-committee should have canvassed this concept more thoroughly. Certainly, most law firms would feel they had let their clients down in an arm's-length bargaining situation if some recognition in the colossal enrichment of Christiana shareholders were not given outside DuPont shareholders.

As stated, even a fair as compared to a fairly aggressive approach would give reason for a better deal without injustice or overachieving to Christiana or its shareholders. On the contrary, a fair comment would be that we are observing the dismantling of "noblesse oblige", a carefully structured public relations stance of the du Ponts to their company's shareholders.

° ° °

IF THE SHAREHOLDERS MEETING IS NOT POSTPONED until time for consideration of an appeal from the action of the S. E. C. (either after a hearing or denying a hearing) is expired, the protection of the 1940 Act will be nullified. The files indicate that proxy approval consideration is well advanced. If no hearing is to be granted, and if no substantial modification of terms is directed without a hearing, and if no additional filings are made available to the undersigned for study (at the S. E. C. library if necessary), there is danger that proxy approval around the time of the next S. E. C. actions, will result in immediate mailing that would negate the rights of DuPont shareholders as a practical matter under Sections 35 and 42 of the Investment Act of 1940 as well as frustrating its general purposes.

Therefore, in the interests of the undersigned and all other shareholders of DuPont (other than Christiana), the undersigned requests that the approval of a proxy statement on the Notice of a meeting of shareholders of DuPont be held back to the extent necessary to allow for a court review of any order. To do equity the undersigned offers to file a Petition within thirty days, rather than sixty days, in the Circuit Court of Appeals. The giving of notice of the shareholders meeting almost certain to follow immediately as a tactical matter with a favorable finding by the Commission and approval of a proxy statement in hand, unless restrained by the Commission by conditioning its action on a thirty day delay after the record is filed, will cause irreparable harm, forcing an individual into a class action where under Rule 23 of the Federal Rules enormous difficulties are presented of expense as well as effort. The 1940 Act was intended to afford a full consideration by the S. E. C. after hearing all the evidence in just this situation.

Naturally, the writer feels the proxy as presently proposed is incomplete and misleading, for the same reasons as above set forth, and others which could be developed with time.

One point which obviously is lacking is a notice of this or any other challenge to the proposal with further possibilities of appeal. Another is the failure to include information as to Christiana's contentions based on the affirmation of Irénée du Pont, a director of Christiana and DuPont, that a distribution of a far less percentage of a more widely traded stock injuriously affects prices for all the stock (see Exhibit "B").

My point, however, is that calling the stockholders meeting will merely compound confusion if the appeal rights of the undersigned go forward.

DuPont and Christiana have lived with each other 40 years. Their relationship invokes all the protections envisioned as needed by the Investment Act of 1940 and no sufficient reason exists for denying the full benefits of the Act to the shareholders of DuPont fixed in a web of interlocking directorates in probably the most obvious (and colossal in terms of dollars) conflict of interest posture in corporate legal and financial experience since the securities industry first came under mature control.

Respectfully submitted:

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh,
Trustee for Emanuel and Helen Steib under Declaration of Trust dated 8/30/56.

LCM/lz
Enclosures

EXHIBIT "A"

[Letterhead of]

MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

October 13, 1972

Securities & Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Mr. C. B. McCoy
Chairman and President
E. I. duPont de Nemours & Company
Wilmington, Delaware 19898

Gentlemen:

I am the record owner, as Trustee, of 400 shares of DuPont common stock. My wife, Mary Imelda Murtaugh, is record owner of 1350 shares.

I am very interested in having the opportunity of inspecting the S. E. C. filings, including supporting instruments, in connection with the Christiana Securities Company merger. Please advise how this would be practically possible.

Thank you very much for your early reply. The deadline of October 27, 1972, makes this request for promptness unavoidable.

Very truly yours,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh.

LCM:lz

EXHIBIT "B"

TO

REQUEST FOR HEARING AND ADVICE

BY LEWIS C. MURTAUGH, TRUSTEE

In Re: Securities & Exchange Commission
No. 812-3224

Application of Christiana Securities Company and E. I. duPont de Nemours & Company

Upon inspecting the company's filing with the S. E. C. in Washington, on Thursday, October 19th, I noted the number of the Tax case referred to in the filings, namely, *Christiana Securities Company v. United States of America, Civil Action No. 3831, United States District Court for the District of Delaware.* On Friday, I called the Clerk of that Court and requested a copy of the Complaint, which was forwarded and received in the morning mail on Tuesday, October 24th. The final draft of the "Request for a Hearing and Advice" was past the point where this information should be included logically, and it is added here as a Supplement:

The Complaint recites that in connection with the distribution of 6,708,560 shares of General Motors to Christiana in 1962, that the Internal Revenue Service failed to agree to a valuation of the shares at a fair market value which reflected the discount from current market prices to which the large block of shares were entitled.

DuPont owned 63 million out of 285 million shares of General Motors, or between 22 and 23% (This is over six times the issued shares of DuPont.). Christiana's 28% shares of these shares on distribution from DuPont would be around 17,600,000 shares. On July 9, 1962, it received 6,708,560 shares of General Motors, the first of three distributions. This was a little less than 2½% of all General Motors shares. Let the Complaint speak for itself as to the 1962 distributions, paragraphs 23 to 31 follow as part of this text:

> 23. In order to determine the "fair market value" of this block of GM stock, Taxpayer retained two leading underwriting firms, Morgan Stanley & Co. (hereinafter referred to as "Morgan Stanley") and Merrill Lynch, Pierce, Fenner & Smith Inc. (hereinafter referred to as "Merrill Lynch") to make independent appraisals of the value of such block of stock. The underwriting firms at that time were asked to determine the value of this block of stock as though no restrictions had been imposed thereon under the Judgment. The diminution in value resulting from such restrictions was therefore not taken into account in the contemporaneous appraisals made by these underwriting firms.
>
> 24. Morgan Stanley and Merrill Lynch each concluded that the fair market value of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 would not be accurately reflected by the prices paid for GM common stock in New York Stock Exchange transactions on or about July 9, 1962. In their view, such a large block of stock would have a seriously depressing effect on the market and could be sold only at prices substantially below the prices paid for the relatively very small amounts of stock actually sold on the New York Stock Exchange on or about July 9, 1962.
>
> 25. Morgan Stanley and Merrill Lynch each further concluded that sales to underwriters for the purpose of secondary distributions would be the only

feasible market for such a block of stock and that its "fair market value" should be determined with reference to the price that would be received on such a sale to underwriters.

26. In the opinion of Morgan Stanley, the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 was $275,050,960 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

27. In the opinion of Merrill Lynch, the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 was $277,566,670 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

28. On its Federal income tax return for the calendar year 1962 Taxpayer reported as part of its gross income a value for the 6,708,560 share block of GM common stock received by it on July 9, 1962 based on the average of the appraisals by Morgan Stanley and Merrill Lynch values referred to above, *viz.*, $276,308,815, and erroneously failed to take into account the fact that the "fair market value" of that block of stock was much lower because of the restrictions placed on such block by the Judgment.

29. The "fair market value" of the 6,708,560 share block of GM common stock, after taking account of the effect of the restrictions placed on such block by the Judgment, was not in excess of $248,677,933.

30. The District Director erroneously concluded that the "fair market value" of the 6,708,560 share

block of GM common stock received by Taxpayer should be determined by multiplying by 6,708,560 the average of the highest and the lowest per share prices of the relatively small amounts of GM common stock traded on the New York Stock Exchange on July 9, 1962, and therefore erroneously determined that the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 was $319,914,455.

31. The total refund of taxes due to Taxpayer by reason of the improper and erroneous valuation of the 6,708,560 share block of GM common stock received by it on July 9, 1962 is $5,337,437. In making this claim, Taxpayer has given effect to, and set off, an increase of $219,011.72 in taxes on increased capital gains realized on its sale during 1962 of 550,000 shares of GM common stock out of the block received by it on July 9, 1962 (such increased capital gains being attributable . . .).

It will be noted Christiana claims a discount of over 13% because of a distribution of only 2½% of General Motors stock. And it bases this on findings of prestigeous houses to support its contentions. (Morgan, Stanley & Co., one of the presently involved advisors, is one.) Here, Christiana is about to distribute *at one time* 28% of DuPont (13,000,000 plus shares) and endeavoring to persuade the S. E. C. and its chained DuPont shareholders to make this possible without any evidence on the points as to value impact on all shares.

We have no doubt that the same financial houses would have raised their discount greatly if Christiana received all 17,600,000 General Motors shares at once, even though this would still only be 7% of outstanding General Motors shares, as against 28% here.

Paragraphs 69-80 of the Complaint make a similar claim as to the 1964 distribution of 4,830,163 shares of General Motors, only about 1¼% of the outstanding General Motors though the discount value of this per experts was only 10%.

Paragraphs 102-113 pertain to the 1965 distribution of 6,708,560 shares of General Motors. The same experts were retained and DuPont accepted and sponsored their average figure which was 8½% below the market period of General Motors stock.

The claims for refunds attached to the Complaint are all signed by Irénée duPont, Jr., as an officer of Christiana, who I believe, is the same gentleman whose letter to Mr. McCoy started the merger ball music. Mr. DuPont affirms "under penalties of perjury" that after taking account among other things "of the huge amount of stock involved" (about 2½% in 1962 and 1965 and much less in 1964) that the value of General Motors was much less market value.

Lewis C. Murtaugh

(A)

THE VALUATION OF GM STOCK RECEIVED BY TAXPAYER

69. This part of Taxpayer's refund claim for the year 1964 is similar to that part of its refund claim for 1962 set out in paragraphs 10-31 hereof with regard to the valuation of GM stock received by Taxpayer.

70. On January 6, 1964 Du Pont made a distribution, pursuant to the Judgment, to Taxpayer of 4,830,163 shares of GM common stock.

71. Pursuant to section 301(f) of the Internal Revenue Code of 1954 Taxpayer was required to include the "fair market value" of the 4,830,163 share block of GM common stock in its gross income for the year 1964.

72. In order to determine the "fair market value" of this block of GM common stock, Taxpayer retained Morgan Stanley and Merrill Lynch to make independent appraisals of value of such block of stock. The underwriting firms at that time were asked to determine the value of this block of stock as though no restrictions had been imposed thereon under the Judgment. The diminution in value resulting from such restrictions was therefore not taken into account in the contemporaneous appraisals made by these underwriting firms.

73. Morgan Stanley and Merrill Lynch each concluded that the "fair market value" of the 4,830,163 share block of GM common stock received by Taxpayer on January 6, 1964 would not be accurately re-

flected by the prices paid for GM common stock in New York Stock Exchange transactions on or about January 6, 1964. In their view, such a large block of stock would have a seriously depressing effect on the market and could be sold only at prices substantially below the prices paid for the relatively very small amounts of stock actually sold on the New York Stock Exchange on or about January 6, 1964.

74. Morgan Stanley and Merrill Lynch each further concluded that sales to underwriters for the purpose of secondary distributions would be the only feasible market for such a block of stock and that its "fair market value" should be determined with reference to the price that would be received on such a sale to underwriters.

75. In the opinion of Morgan Stanley, the "fair market value" of the 4,830,163 share block of GM common stock was $352,601,899 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

76. In the opinion of Merrill Lynch, the "fair market value" of the 4,830,163 share block of GM common stock was $354,244,154 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

77. On its Federal income tax return for the calendar year 1964 Taxpayer reported as part of its gross income a value for the 4,830,163 share block of GM common stock received by it on January 6, 1964 based on the average of the appraisals by Morgan Stanley and Merrill Lynch referred to above, *viz.*,

$353,423,027, and erroneously failed to take into account the fact that the "fair market value" of that block of stock was much lower because of the restrictions placed on such block by the Judgment.

78. The "fair market value" of the 4,830,163 share block of GM common stock, after taking account of the effect of the restrictions placed on such block by the Judgment, was not in excess of $318,080,723.

79. The District Director erroneously concluded that the "fair market value" of the 4,830,163 share block of GM common stock should be determined by multiplying by 4,830,163 the average of the highest and the lowest per share prices of the relatively small amounts of GM common stock traded on the New York Stock Exchange on January 6, 1964, and therefore erroneously determined that the "fair market value" of the 4,830,163 share block of GM common stock was $381,582,877.

80. The total refund of taxes due to Taxpayer by reason of the improper and erroneous valuation of the 4,830,163 share block of GM common stock received by it on January 6, 1964 is $4,565,456.55. In making this claim, Taxpayer has given effect to, and set off, an increase of $197,205 in taxes on increased capital gains realized on its sale during 1964 of 400,000 shares of GM common stock out of the block received by it on January 6, 1964 (such increased capital gains being attributable to a correction of the prior erroneous determination of "fair market value", which correction has the effect of reducing the tax basis of such GM shares in Taxpayer's hands).

(A)

THE VALUATION OF GM STOCK RECEIVED BY TAXPAYER.

102. This part of Taxpayer's refund claim for the year 1965 is similar to those parts of its refund claims for 1962 and 1964 set out in paragraphs 10-31 and 69-80 hereof with regard to the valuation of GM stock received by Taxpayer.

103. On January 4, 1965, Du Pont made a distribution, pursuant to the Judgment, to Taxpayer of 6,708,560 shares of GM common stock.

104. Pursuant to section 301(f) of the Internal Revenue Code of 1954 Taxpayer was required to include the "fair market value" of the 6,708,560 share block of GM common stock in its gross income for the year 1965.

105. In order to determine the "fair market value" of this block of GM common stock, Taxpayer retained Morgan Stanley and Merrill Lynch to make independent appraisals of value of such block of stock. The underwriting firms at that time were asked to determine the value of this block of stock as though no restrictions had been imposed thereon under the Judgment. The diminution in value resulting from such restrictions was therefore not taken into account in the contemporaneous appraisals made by these underwriting firms.

106. Morgan Stanley and Merrill Lynch each concluded that the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on January 4, 1965 would not be accurately reflected by the prices paid for GM common stock in

New York Stock Exchange transactions on or about January 4, 1965. In their view, such a large block of stock would have a seriously depressing effect on the market and could be sold only at prices substantially below the prices paid for the relatively very small amounts of stock actually sold on the New York Stock Exchange on or about January 4, 1965.

107. Morgan Stanley and Merrill Lynch each further concluded that sales to underwriters for the purpose of secondary distributions would be the only feasible market for such a block of stock and that its "fair market value" should be determined with reference to the price that would be received on such a sale to underwriters.

108. In the opinion of Morgan Stanley, the "fair market value" of the 6,708,560 share block of GM common stock was $590,353,280 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

109. In the opinion of Merrill Lynch, the "fair market value" of the 6,708,560 share block of GM common stock was $590,688,708 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

110. On its Federal income tax return for the calendar year 1965 Taxpayer reported as part of its gross income a value for the 6,708,560 share block of GM common stock received by it on January 4, 1965 based on the average of the appraisals by Morgan Stanley and Merrill Lynch referred to above, *viz.*, $590,520,994, and erroneously failed to take into account the fact that the "fair market value" of that

block of stock was much lower because of the restrictions placed on such block by the Judgment.

111. The "fair market value" of the 6,708,560 share block of GM common stock, after taking account of the effect of the restrictions placed on such block by the Judgment, was not in excess of $531,468,895.

112. The District Director erroneously concluded that the "fair market value" of the 6,708,560 share block of GM common stock should be determined by multiplying by 6,708,560 the average of the highest and the lowest per share prices of the relatively small amounts of GM common stock traded on the New York Stock Exchange on January 4, 1965, and therefore erroneously determined that the "fair market value" of the 6,708,560 share block of GM common stock was $644,441,045.

113. The total refund of taxes due to Taxpayer by reason of the improper and erroneous valuation of the 6,708,560 share block of GM common stock received by it on January 4, 1965 is $8,055,020.07. In making this claim, Taxpayer has given effect to, and set off, an increase of $78,974.76 in taxes on increased capital gains realized on its sale during 1965 of 125,059 shares of GM common stock out of the block received by it on January 4, 1965 (such increased capital gains being attributable to a correction of the prior erroneous determination of "fair market value", which correction has the effect of reducing the tax basis of such GM shares in Taxpayer's hands).

[Letterhead of]

MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

October 31, 1972

Mr. Ronald F. Hunt, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

In Re: 812-3224
Application of Christiana Securities Company
and E. I. DuPont de Nemours Company

SUPPLEMENT TO FILED REQUEST
DATED OCTOBER 25, 1972

Dear Mr. Hunt,

Mr. Gribbon of Covington & Burling sent me a copy of his letter of October 27 together with a copy of Amendment No. 6 to the above application. The amendment raises added points which I believe are relevant in considering whether a hearing should be granted. To save time, I have attached herewith copies of pages 2 and 3 of Amendment No. 6 with points of reference noted in the text and on the margin. This will save time in restating and possibly misstating the contents of the amendment.

1. There was nothing in the covering letter of Mr. McCoy or in the S. E. C. notice indicating consideration of the effect of a proposed 13,000,000 plus shares of DuPont being on the market or adverting to this aspect. Though we comment here on the filing as amended by this Amendment No. 6, we wish to point out that no other shareholder

has as much information as a reasonable digest of the filing as now amended would provide.

2. I have only my notes and recollection as to the financial advisors' material. My recollection is that First Boston Corporation did not refer to this point at all, that Morgan Stanley referred to it only in passing as being a matter which they did not analyze. My notes definitely show that Kidder Peabody relied entirely on the applicants' counsel's advice. I quote from my notes with the warning that they might not be exact. *"We have been advised that counsel is not aware of any plans to register or sell DuPont stock, thus (sic) do not anticipate any impact on DuPont. . . ."* Thus the advisors point to counsel for not investigating this and now counsel points to the advisors as "indicating" something. Every "indication" was that the advisors left this matter unexplored. In fact the prospectus prepared after the advisors had filed their opinion furnished a good deal of indication that public offerings are very much in the wind. I believe DuPont is even going to pay for them. Thus the advisors' premised their opinion on assurances and assumptions not presently accurate.

3. "When ignorance is bliss, tis folly to be wise."

4. The proposed ratio which has resulted in a 33% increase in the market value of Christiana since March, 1972, will present the new DuPont shareholders with more than enough extra money to pay all the capital gains taxes. In fact it already has in part and will indefinitely into the future.

5. Assuming the 70% figure is correct, this leaves about 8,000 shareholders of Christiana who will hold over 4,000,000 shares of DuPont unrestricted. In the 1964 General Motors Distribution, this was about the same number

of General Motors shares constituting, however, less than 2% of outstanding General Motors shares. Four million plus shares approaches 10% of all DuPont shares and greatly exceeds 10% of the 34,000,000 presently outstanding shares in non-Christiana hands. Mr. Irénée du Pont, Jr., and Morgan Stanley assert in the tax refund suit that this smaller percentage, less than 2% of a much wider traded stock required a substantial discount because of its impact on the price of General Motors shares. It is submitted that the Commission should request and place in the record the supporting data in the tax case referred to in the Exhibit B of the undersigned Request. Paragraphs 72 to 79 of the complaint attached to this Request has to do with the 4,000,000 plus shares of General Motors. Certainly the undersigned will do everything possible to attempt to introduce such evidence at the time of a hearing.

6. The limitations and restrictions referred to may modify the random selling rights of 8 to 9,000,000 out of the 13,000,000 plus shares of newly issued DuPont, but won't keep them off the market or from overhanging the market. The requirements of future registration present no relevant protection in the present context. Perfect truth will no doubt be fully stated and registration will result without question. Here and now is the time 72% of DuPont shareholders are being asked to sacrifice their financial best interest and the S. E. C. is being asked to find the matter fair and reasonable without a hearing.

7. This is a very relevant approach. The 4,000,000 plus shares which are all unrestricted are equal to or exceed the total volume of all DuPont shares traded in 1971 and of course the full 13,000,000 plus shares either transferable or overhanging the market though "restricted" equal over three years sales volume. This valuable ap-

proach would have been better in the notice already sent and should be fully explored in a hearing in any event.

8. Shareholders should not be asked to depend in this situation on an asserted "belief" so lightly supported and so easily motivated by self-interest of the most obvious sort. A full hearing after a full investigation on the points in this original "Request" and herein stated may clear the air.

9. Suppose Christiana shareholders were involved in a taxable merger here. Can anyone doubt that Wilmington Trust Company and some of the large holders of the newly issued DuPont would be in there fighting tooth and nail with the Treasury over their being required to value DuPont at the market? Morgan Stanley would only have to dig into its old files. Essentially, the same elements affecting value are present here. Only wrapped in silence.

Respectfully submitted:

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib under Declaration of Trust dated 8/30/56.

LCM:sl
Enclosure

The following information relative to potential impact on the market for Du Pont common stock as a result of the proposed merger is submitted by way of Amendment No. 6 to Application in this matter dated July 19, 1972.

In the course of the merger negotiations the Special Board Committees of Du Pont and Christiana considered the possible immediate and longer term effect of the merger transaction on the market for Du Pont common stock, and discussed this aspect of the transaction (including the comments thereon in their reports filed as exhibits to this [1] Application) with the financial advisors. [1] The financial advisors indicated that, in their opinions, there would be no significant or prolonged adverse impact on the market for [2] Du Pont common stock. [2] Pertinent factors relevant to such discussions and conclusions are summarized below:

1. More than 50% of the outstanding shares of Christiana common stock are held of record by Wilmington Trust Company in various fiduciary capacities, principally in trust for the benefit of several hundred individuals and institutions. In addition, a number of individuals hold of record substantial quantities of the shares. Generally, these holdings in trust and directly by the individual stockholders have existed for many years and are in the nature of a long-term investment in the Du Pont Company via stockholdings in Christiana.

   Persons owning Du Pont common stock make their own decisions as to sales of such stock; however, [3] Applicants know of no reason to believe [3] that, upon shift of their long-term investments by reason of the merger from an indirect interest in

Du Pont via holding Christiana common stock to a direct holding of Du Pont common stock, there would be any tendency for a large portion of such Du Pont common stock to be sold by such stockholders. Moreover, the tax basis for the Christiana shares held by such stockholders generally is very low (zero in many cases) due to the impact of the divestiture of General Motors stock by Du Pont and Christiana in the 1960's. As a result, the potential [4] tax effects of sales of such shares [4] represent a substantial deterrent to sales by such stockholders of Du Pont common stock received by them in the [5] merger. [5]

2. The directors of Christiana and certain other stockholders of Christiana may be deemed within the meaning of the Securities Act of 1933 and Regulations thereunder (1933 Act) to be "affiliates" of Christiana. As a result, such persons will be restricted by the 1933 Act with respect to disposition of shares of Du Pont common stock received by them in the merger. Du Pont has determined that it will treat Wilmington Trust Company as so restricted with respect to disposition of certain of the shares of Du Pont common stock it receives in the merger.

[6] Based on information currently available, [6] it is anticipated that approximately 70% of the Du Pont common stock to be issued in the merger transaction will be subject to the foregoing restrictions which will prevent their sale to the public other than pursuant to an effective registration statement filed under the 1933 Act or in "brokers' transactions" as defined in the 1933 Act.

The applicable restrictions will be specified in agreements to be entered into between Du Pont and each stockholder of Christiana who will receive such restricted stock. These agreements will provide for restrictive legends to be placed on certificates for shares issued to such stockholders in the merger, and will further provide that such legends may be removed only to permit sale of such shares pursuant to an effective registration statement filed under the 1933 Act or upon receipt of an opinion of counsel satisfactory in form and substance to Du Pont that registration is not required under the 1933 Act to permit sale of such shares.

Certain registration rights will be afforded to the stockholders under these agreements, limited so as to permit registered sales of restricted shares only 1) during the months of April and October of each year in any lawful manner other than a firm commitment underwritten offering and 2) at one other time during each year in a firm commitment underwritten offering of at least $25 million in then current market value of such shares. No other public sales of the restrictive shares would be permitted, except in "brokers' transactions" as defined in the 1933 Act, which transactions may not exceed, for any person in any six-month period, approximately one week's reported trading volume in Du Pont [7] [8] common stock. [7] Applicants believe [8] that these limitations on public sale assure that any public sales of Du Pont common stock to be issued in the merger would occur in an orderly fashion without significant or prolonged adverse impact on the market for Du Pont common stock.

[Letterhead of]
MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

November 14, 1972

Mr. Ronald F. Hunt, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

In Re: 812-3224

Application of Christiana Securities Company
and E. I. DuPont de Nemours Company

SUPPLEMENT TO FILED REQUEST DATED
OCTOBER 25, 1972

Dear Mr. Hunt:

On Page 6 of the Commission's Notice of Filing dated October 3, 1972 interested persons were advised they might request a hearing and submit reasons. The original Request of the undersigned was filed October 26, 1972. A copy of Amendment No. 6 of the applicants dated October 27, 1972 was received on October 30 and a supplement in response to the Amendment dated October 31, 1972 has heretofore been sent by the undersigned. Deeper concentration on the content of Amendment No. 6 together with some collateral research which turns out to have serendipitous relevance prompts me to presume on the patience of all by adding to the support of the reasons heretofore stated.

In preparing for a trial in a current estate tax refund case now pending in our local Federal Court, I find a case in point on the valuation of the reversionary interest in the Steib Trust of which I am successor trustee, which trust owns, among other assets, 400 shares of DuPont. This reversionary interest is part of the estate of the late David B. Maher, who created the Steib Trust.

The case is *Henry F. DuPont vs. Commissioner (1943) 2 Tax Court 246.* It appears that Henry F. DuPont created a trust in 1927 to pay income to his sister, reserving powers as to the remainder, which, tax-wise, were determined to be equal to a reversionary interest for himself. When he released these powers on January 4, 1939, the release was determined to be a taxable gift by him of the reversionary interest. The question of the valuation of the reversionary element in the gift involved actuarial matter germane to my local tax refund suit, but, relevant to the above application, is that there is detailed attention given to the valuation of the only asset held in trust namely 52,900 shares of DuPont which was 4.8% of the then outstanding 11,065,717 shares. The court considered among other things a table presented by Mr. DuPont's counsel showing the total shares traded in 1938 (826,000) which was about sixteen times the DuPont trust block. This was presented to demonstrate that 52,900 shares relative to the market would greatly depress all shares if sold and therefore should have a discount for gift tax valuation.

In this application, we have thirteen million shares which is 28% of the 47,500,000 outstanding DuPont and over 38% of the shares presently on the market (non-owned by Christiana). The 1971 sales volume, four million or so, related to the thirty-four million available DuPont shares is not too much different than the 1938 volume of 826,000 out of 11,065,717 shares considering Christiana probably had the same proportion of DuPont frozen. But, here we

are considering addition to available shares of three times the yearly volume of 1971 sales as against 6% of the yearly volume in the *DuPont* tax refund case referred to, which was claimed to have and was accorded much significance.

There was a considerable amount of other evidence, of a type which should be considered here, as to the valuation of such a large number of shares proposing larger discounts, but as against the government's claim for quoted market value, the tax court concluded that the value of each share of stock (before applying actuarial data) was $135.00 per share $18.00 below market or 13% below the market price.

Even the most conservative speculator as to possible added sales resulting from the proposed merger would not sponsor a suggestion that at least 4.8% of the new DuPont Shares would not be added to the market annually for some time. In fact, if the new DuPont was only sold on the same ratio as sales out of the thirty-four million marketable shares were sold in 1971, roughly 10%, there would be 28% more shares for sale than in 1971. In the *DuPont* Case referred to, a quantity of shares equal to six percent of the previous years sales volume was involved.

Here, if the 13 million added shares were only sold at the 1971 ratio of DuPont shares (about 10% of all shares) 1,300,000 added shares will be sold or about 33% of the 1971 volume. This is more than six times the relation of shares to volume which was held to warrant a 13% market discount in the *Henry F. DuPont* case, with which I agree.

Of course, there will be more, much more, than 10% of the new DuPont shares sold in the first year as well as in near years to come, and the "water torture" method of selling restricted stock may present an overhang situation worse than if selling intentions of the holders of all 13 million new shares were executed at will. It isn't hard to

visualize security analysts, presently asleep (sedated?) at the switch, adding this to their future cautionary dicta.

The undocumented generalities at the bottom of Page 2 of Amendment No. 6 about the deterrent effect of tax consequences, do not take into account that du Ponts as well as the entire preceding generation of my wife's family since they acquired DuPont forty-eight years ago, have been bequeathing and giving away Christiana stock and the new holders have a new basis. This certainly applies to the 56% held in trust. In addition many of the trusts are charitable and many of the holders are charities and charitable foundations. The tax benefits of giving appreciated stock in one form or another have been widely advertised by charities for years. Some times (until the Tax Reform Act of 1969) you could get a full deduction and pocket money net. (Will anyone who believes the du Ponts do not get good tax advice Please apply for a free dunce cap?) Charities, charitable foundations and charitable trusts will have no tax deterrent problems, except possibly some created by the Tax Reform Act which may accelerate a trust's or charitable foundation's need to sell. (Information please?).

Speaking of trusts, certainly Wilmington Trust Company, as Trustee, will have the most outstanding track record of the year among the nation's fiduciaries as it records the 33% growth in du Pont family trust portfolios, its 56% of the bounty or booty from the half billion dollar coup. DuPont shareholders may well be envious and reflect: "Wouldn't it be great if we had a fiduciary like that—a real McCoy."

• • •

How can DuPont undertake to prosecute the Christiana tax case when any success that results comes out of the 188,000 shares added to DuPont's treasury to

validate the merger? Is is not the duty of DuPont to protect the shares in its treasury? It can do it very well by using the same contentions as are made in this context. How can DuPont whistle one tune in the tax case about the affect of a much smaller blockage added to the market and whistle another tune to the S. E. C. and to DuPont shareholders about the slight affect of 13 million shares added to the market?

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh,
Trustee for Emanuel and Helen
Steib under Declaration of
Trust dated 8/30/56.

LCM:me
Enclosure

cc: Mr. Daniel M. Gribbon
Covington & Burling
888 Sixteenth Street, N. W.
Washington, D. C. 20006

Mr. C. B. McCoy, Chairman
and President
E. I. DuPont de Nemours & Company
Wilmington, Delaware 19898

Exhibit B
To Application of Lewis C. Murtaugh,
as trustee to intervene
(case 812-3224)

I undertake to supply to the record of this case a concise summary of the relevant case of *United States vs. E. I. Du Pont De Nemours, General Motors Corporation, Christiana Securities Corporation and Delaware Realty & Investment Corporation, Civil Action No. 49C1071* in the United States District Court for the Northern District of Illinois, Eastern Division and to add some thoughts to what was expressed on this in Exhibit A(1) P 5-7. The suit charged that the acquisition of 23% of General Motors Corporation by DuPont shortly after World War I violated the Sherman Act and the Clayton Act. The case was assigned to Judge Walter J. LaBuy who heard thousands of pages of testimony and received a multitude of exhibits.

Judge LaBuy's decision that the government had failed to prove a violation of either Act is reported in *126 F. Supp.* 235 and the Supreme Court's reversing finding of a violation of the Clayton Act is reported in *353 U. S. 586.* The Supreme Court opinion referred the matter back to Judge LaBuy to make a decree consonant with its decision i.e. to resolve the existing situation so that there would be no violation.

On the remand the government asserted that only divestiture was a solution. On the other hand the defendants contended that the voting control was the key element in the violation and that passing through the votes of DuPont and Christiana and Delaware to their individual shareholders was a reasonable solution, since the control element would be dissipated. At defendant's urging, the government presented a proposed decree which pro-

vided for a distribution of the 63,000,000 shares of General Motors over a ten year period to the shareholders of DuPont but required the Christiana and Delaware Trust shares to be sold roughly at the rate of 2 million shares a year with a little leeway. There were a little over 19 million shares thus involved. The balance of the shares, roughly 44 million were to be distributed to shareholders other than Christiana and Delaware as a stock dividend. Being in the stock of another company, the distribution would under ordinary income tax principles be taxable as dividends. Concurrently there had been relief legislation in Congress to mitigate the tax effect but no law had been adopted prior to the conclusion of the hearing by Judge LaBuy on remand.

Judge LaBuy eventually accepted the defendant's suggestion of a pass through of voting rights without divestiture due to the depressing effect on 23% of outstanding General Motors shares being added to the market even on a ten year installment basis. His opinion is found at 177 F. Supp. 1. The hearings on this first remand are the *meat* of the pertinence and relevance on this DuPont Christiana Merger issue as well as the arguments on appeal.

To hurry through the original case, on appeal the Supreme Court reversed Judge LaBuy again holding divestiture necessary, gave some ground rules and again sent the matter back to Judge LaBuy (366 U. S. 316).

Thereafter a decree was entered by the Judge, whereunder the 1.37 shares of General Motors for each share of outstanding DuPont held in DuPont's treasury was distributed to DuPont shareholders ½ share in 1962, .37 of a share in 1964, and ½ share in 1965. These distributions were not taxable to ordinary DuPont shareholders within certain limits because of remedial legislation which had by then been adopted but they were taxable to Christiana,

which had by then merged with Delaware Trust. To comply with mandate of dispersing control or influence over General Motors, Christiana was not allowed to pass the General Motors shares it received through to its largely DuPont family interests, but it was required to otherwise dispose of them which it did by 1966. Christiana was not included in the legislative tax relief and claimed it was entitled to a substantial discount from the market value of General Motors shares for tax purposes because of the large number of shares it received on each distribution. This is all set out in Exhibit B to Exhibit A(1) attached hereto and not repeated here. It eventually paid a big deficiency and sued for a refund which matter is a part of the elements of this merger, and is still to be resolved. It has much pertinence here as argued in Exhibit B to Exhibit A(1) attached hereto.

Judge LaBuy's decision on the first remand followed about 25 days of hearings. More than half of these were parading to the witness stand of senior people of Morgan Stanley, Merrill Lynch, First Boston Corporation, distinguished economists, bank presidents, trust department heads and others who testified that the ten year plan of 2 million shares a year sales by Christiana plus what would be sold by shareholders out of the 4,400,000 shares they would receive each year, plus what would be sold by other General Motors shareholders in dismay at all the above mentioned selling, would drive General Motors share down until bargain basement buying would come in and the overhang of future sales would relentlessly keep General Motors shares depressed. Since at that time no tax relief had been enacted the selling to pay taxes was prominently featured, but not exclusively relied upon for the down push on General Motors share values. Since Christiana was not given Tax relief its pending claim and suit for

refund is a cognate issue without blemish and the need for discovery on this is obvious. Even the issue before Judge LaBuy on the first remand is close because the prime emphasis was on the effect of sales on General Motors shares, whether for tax or other purposes.

After the facts put in issue by Amendment No. 6 of the application for Exemption are thoroughly outlined we will be better able to judge the overhang effect of the restrictions. The briefs, testimony and documentary evidence on market effect in the first remand hearing before Judge LaBuy is dated but should be useful (and cheap).

There is much that are admissions and material for cross-examination, and much may be updated by material in the current tax refund suit by Christiana. General Motors is about the most widely traded stock on the New York Stock Exchange. If putting out very small percentages a year could potentially have the major effects testified to by General Motors and DuPont interests, what effect should 28% of a stock traded not ten percent as much as General Motors have?

Exhibit C

November 22, 1972

Cyril V. Smith Jr.
Covington & Burling
888 Sixteenth St. N.W.
Washington, D. C. 20006

Dear Mr. Smith:

Thank you for the copy of the Memorandum recently filed with the SEC.

In an attempt at constructive thinking could you, from data Christiana has or could easily accumulate, give me a table of figures showing the number of Christiana shareholders with:

Less than 100 shares .....
100-300 shares .....
300-500 shares .....
500-1000 shares .....
1000-5000 shares .....
Over 5000 shares .....

Any available classification that approximates this above information will be adequate and much appreciated.

Very truly yours,

/s/ Lewis C. Murtaugh

LCM/me

Administrative Proceeding
File No. 3-3928

—

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
(812-3224)

—

MOTION TO MODIFY ORDER FIXING PRE-HEARING PROCEDURES

On January 11, 1973, an ORDER FIXING PRE-HEARING PROCEDURES was entered, a copy of which was received on January 17, 1973. This motion by Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib under declaration of Trust dated 8/30/56 (hereafter called Movant) is to modify this order for the following reasons:

1. Movant filed, within the time scheduled by the order setting the hearing, namely January 15, 1973, his application for leave to intervene as a party pursuant to rule 9 (e). The application is incorporated by reference at this point for consideration in connection with this motion.

2. It can be noted that Paragraph 5 of Movant's application sets further numerous matters as to which discovery is desired. The witnesses that will be called and the exhibits that will be prepared will be largely responsive to the material produced on depositions, interrogatories and further depositions and interrogatories which may be required by the earlier ones.

3. As an example, it is clear from the application, that Movant expects to make meaningful use of material presently in the control of the Applicants for Exemption. If Movant does not have this material, he cannot make adequate objections or conduct cross-examination at any hearing which is held.

4. The Rules of Practice of the Commission have provisions for discovery, interrogatories, subpoenas and so on which indicate that interested parties are not to be forced to hearing without being given an opportunity to be prepared. Movant wishes to take advantage of this opportunity to be prepared. As set forth in Movant's application he does not believe that he has the right to fully exercise the privileges of pre-hearing discovery which are provided for in the rules unless he has the status of a party. Further as he reads the rules, Rule 14 (b)(1) he does not even have the right to have a subpoena issued.

5. There may be some useful purpose served by having the Applicants for Exemption put in their case *under certain stipulated conditions.* This would undoubtedly save a great deal of pre-hearing discovery and focus issues which may be conceded or disputed. After that opposing parties will still need time for discovery and interrogatories, hopefully, however, much reduced.

6. The stipulated condition referred to in the preceding paragraph which it is submitted are essential before the hearing commences is that the right to cross-examine witnesses presented by the Applicant for Exemption and to object to exhibits be preserved to a time and adequate opportunity has been afforded to make necessary discovery. Of course Applicants for Exemption will not be deemed to have completed or concluded their presentation in the event some opposing material is introduced.

7. What is proposed, if the hearing *must* go ahead on February 5, is that Applicants proceed to make a *prima*

facie case,[1] that persons in attendance be allowed to cross-examine and object to the extent that they wish, but that such participation by parties shall not be deemed to be finished even as to witnesses cross-examined, until remaining discovery is completed and the necessary research. At a minimum, Movant estimates that 45 days after such initial hearing or after he has been given the status of an intervenor will be required to develop the necessary discovery and that assumes a change of attitude. (Note the unanswered letter of November 22, 1972, Exhibit C to Movant's Application to Intervene.)

8. Movant does not seek to excuse the Applicants for Exemption from the ambit of the order of January 11, 1973. If they wish such release, they can move to obtain it. In view of the burden they have and their apparent readiness, it would help clarify matters if advance information such as provided for in the order were given outsiders. Really, what will be presented in opposition does depend on the nature of the evidence in justification. This is clearly a voidable transaction without ample justification due to the enrichment of insiders which will result.

1. Applicants for Exemption have a stern burden. Many cases cited in and citing *Pepper v. Litton*, 308 U. S. 295 are in point. In *Pepper*, the court said, at page 306: (all emphasis added) "A director is a fiduciary. Twin-Lick Oil Company v. Marbury, 91 U. S. 587, 588, 23 L. Ed. 328. So is a dominant or controlling stockholder or group of stockholders. Southern Pacific Company v. Bogert, 250 U. S. 483, 492, 39 S. Ct. 533, 537, 63 L. Ed. 1099. Their powers are powers in trust. See Jackson v. Ludeling, 21 Wall. 616, 624, 22 L. Ed. 492. Their dealings with the corporation are subjected *to rigorous scrutiny* and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation *and those interested therein*. Geddes v. Anaconda Copper Mining Company, 254 U. S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425. The essence of the test is whether or not under all the circumstances the transaction *carries the earmarks of an arm's length bargain*. If it does not, equity will set it aside."

9. Movant is prepared to spend a couple of days in either Washington or Wilmington at Applicants' choice near an available copying machine to review the material that can be made available prior to February 5, 1973, which is described in Paragraph 5 of Movant's application. Movant will hold himself in readiness to be in Washington or Wilmington as Applicants wish on the 25th and 26th or the 30th and 31st of January. Short notification is requested.

10. It would seem that the provisions of Rule 8 (d) might expedite matters, especially if the preliminary discovery referred to in the preceding paragraph is accorded and a request for such a conference as is therein provided is hereby made.

11. Movant specifically objects to any hearing on February 5, 1973, unless a favorable ruling is made on Movant's application to intervene and moves, in the event of an unfavorable ruling, to continue said hearing to a date subsequent thereto, which will provide time for an attempted interlocutory review.

Wherefore, Movant respectfully moves that he be excused from complying with Paragraphs 1 and 2 of the order of January 11, 1973. Actually it seems Movant is covered under Paragraph 3, but since he received notice of the order, he feels impelled to make this motion.

/s/ LEWIS C. MURTAUGH,
LEWIS C. MURTAUGH, TRUSTEE FOR
EMANUEL AND HELEN STEIB
UNDER DECLARATION OF TRUST
DATED 8/30/56.

Lewis C. Murtaugh, Trustee
141 West Jackson Blvd., Room 2650
Chicago, Illinois 60604
312/939-2880

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served by air-mail, postage prepaid, on each of the following:

Sidney Ullman
Administrative Law Judge
1011 L Street, N.W.
Washington, D. C. 20005

Division of Investment Company Regulation
Securities and Exchange Commission
Washington, D. C. 20549

Covington & Burling
888 - 16th Street, N.W.
Washington, D. C. 20006

Dechert Price & Rhoads
1600 Three Penn Center
Philadelphia, Pennsylvania 19102

Richard J. Collins, Jr.
314 North Broadway
St. Louis, Missouri 63102

January 18, 1973

/s/ LEWIS C. MURTAUGH,
MURTAUGH, KING, NEIMAN & GRAIS,
141 West Jackson Blvd., Room 2650,
Chicago, Illinois 60604,
312/939-2880.

Administrative Proceeding
File No. 3-3928

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
January 26, 1973

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

REPLY OF APPLICANTS TO MOTION TO MODIFY ORDER FIXING PRE-HEARING PROCEDURES.

On January 11, 1973, the Administrative Law Judge entered an Order Fixing Pre-Hearing Procedures for the purpose of expediting this proceeding. The Order provides that Applicants and persons theretofore requesting a hearing, including Lewis C. Murtaugh, file by January 22, 1973, lists of witnesses and statements of the subject matter of their testimony as well as lists of proposed exhibits, and further that such persons file summaries of testimony and copies of each exhibit by January 29, 1973. Mr. Murtaugh has moved to be relieved from these provisions. Applicants oppose his motion on the grounds that compliance with the schedule designated by the Administrative Law Judge is necessary to provide an orderly and expeditious manner for presentation of evidence at the hearing, and that Mr. Murtaugh has had ample time to prepare for the hearing.

Mr. Murtaugh received the Notice of Application which was published by the Commission on October 3, 1972, and mailed on October 4 to every stockholder of

Du Pont. Mr. Murtaugh has demonstrated his interest in this matter by filing numerous statements with the Commission since such receipt. He has had the opportunity over several months to examine the Application in this case and it is apparent from the papers he has filed that he has done so. Mr. Murtaugh was promptly served with a copy of the Commission's Order of December 13, 1972 fixing the February 5, 1973 hearing date, and similarly was served with a copy of (but filed no timely objection to) Applicants' December 21, 1972 Motion to Establish Pre-Hearing Procedures. Under the circumstances, Applicants do not believe there is any justification for granting Mr. Murtaugh relief from the Order Fixing Pre-Hearing Procedures. He has had ample opportunity to prepare for the hearing and the presentation of his case.

For the foregoing reasons, it is respectfully requested that the Administrative Law Judge deny the Motion of Lewis C. Murtaugh to Modify the Order Fixing Pre-Hearing Procedures.

Respectfully submitted,

/s/ PETER B. ARCHIE
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Cyril V. Smith, Jr.
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19102

CERTIFICATE OF SERVICE

The undersigned attorney for E. I. du Pont de Nemours and Company hereby certifies that on January 26, 1973, the foregoing "Reply of Applicants . . ." was served (1) by hand on the Division of Investment Management Regulation, and (2) by depositing copies thereof in the United States mail, postage prepaid and properly addressed, to the following persons who have requested participation in the proceedings: Mr. Richard J. Collins, Mr. Ernest N. May, Mr. Daniel W. Maher and Mr. Lewis C. Murtaugh.

/s/ PETER B. ARCHIE
Peter B. Archie

Administrative Proceeding
File No. 3-3928

—

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
January 29, 1973

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

—

REJOINDER TO REPLY TO MOTION TO MODIFY ORDER.

Movant, Lewis C. Murtaugh, as Trustee, has received the reply of Applicants for Exemption to Movant's motion to Modify Order, fixing prehearing procedures, which was entered on January 11, 1973, a copy of which was received by Movant on January 17, 1973.

There seems to be an implication in the reply that Movant was specified by name in the order referred to which of course is not the case.

In the priorities reasonably related to this entire matter, all of Movants energies were directed prior to January 12, 1973, when his Application for Leave to Intervene was dispatched, to preparing said application. This was in compliance of the order provided for the hearing which gave parties until January 15, 1973, to file.

On the question of diligence, Movant has this to report: On December 14, 1972, Movant went to Washington, obtained a copy of the order entered the previous day, went to the public reference room of the Commission and

there ordered one week scheduled delivery copy of the entire file. This was my second trip to Washington on this matter. Unfortunately the order was mired in holiday delays and was not mailed from Washington until January 3, 1973, being received by Movant on January 5, 1973. This is in answer to the statement that Movant has had the opportunity of several months to examine the application. Movant's opportunity for examination was confined to his original visit to Washington October 19, 1972, and on his immediate visit to Washington after the order granting a hearing on December 14, 1972. Movant asserts it is apparent that a prodigious amount of time and energy has been devoted to this matter. There simply was no time to drop everything and reply to Applicants December 21, 1972 motion.

Finally hearing from Mr. Gribbon of the firm of Covington & Burling on the afternoon of January 23, 1973, Movant has arranged to go to Washington for two days, namely January 30 and 31, 1973, to expedite matters by seeing what documentation Applicants are able and willing to expose. There has not only been no "ample opportunity" but there has been no opportunity to prepare this matter and there is no possibility of Applicants presenting his case on or consecutively after February 5, 1973, for reasons already stated.

Movant's motion indicating that he may be resigned to having the hearing proceed on February 5, 1973, *under the conditions set forth in the motion* should not be construed as a waiver of his undoubted right to be prepared in this extraordinary situation which involves probably as much in dollar terms of alleged over-reaching as has concerned the Commission in total in several years. This matter simply cannot be hurried. Full discovery must be had and Movant intends to use every means in his hands to insure this end and to bring out all of the evidence, 95% of which is in control of the Applicants for Exemption.

By Wednesday evening, January 31, 1973, Movant will have a better understanding of the extent to which the Applicants intend to produce evidence relating to this awesome affair.

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh, Trustee for
Emanuel and Helen Steib Under
Declaration of Trust Dated 8/30/56

Lewis C. Murtaugh
Murtaugh, King, Neiman & Grais
141 West Jackson Blvd. Suite 2650
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312/939-2880

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Rejoinder to Reply to Modify Order was served by air mail, postage prepaid, on each of the following:

1. Division of Investment Company Regulation
   Securities and Exchange Commission
   Washington, D. C. 20549
2. Covington & Burling
   888 16th Street, N.W.
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3. Dechert Price & Rhoads
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   Philadelphia, Pennsylvania 19102
4. Daniel W. Maher
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5. Richard J. Collins, Jr.
   314 North Broadway
   St. Louis, Missouri 63102

January 29, 1973

/s/ LEWIS C. MURTAUGH.
Lewis C. Murtaugh.

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the veil from what I assume is an assertion on the part of Christiana that General Motors shares are still hurting from the DuPont distributed shares. In other words, that the impact is still there. General Motors now sells at ten times earnings. In the letter of Morgan Stanley dated January 29, 1965, (the next to last page) the mean price earnings ratios of General Motors for the years 1955 to 1964 is given. In 1964 the mean price earnings ratio was 14.9%. Now its around 10 (Murtaugh Exhibit 13).

The Third Occasion Morgan Stanley letters did not hesitate to turn, not to sales on the Exchange, but to the underwritten secondaries as the only way to derive the highest value. It chose a single secondary but considered two or more as possibilities, discarding successive secondaries however because of negative overhang. I accept secondaries', best efforts or underwritten, as the best way to liquidate the four, five and six figure blocks of DuPont that Christiana shareholders will receive if the merger is approved. But each competes for demand and increases supply.

It is true that the issue of blockage valuation° has its special features, for example, it does not cast its shadow before it as in the case with secondaries. But when the market is receiving the secondary and reacting to it at the time of reception and reacting thereafter, the issue is exactly the same as is faced by the person appraising a blockage situation. The effect of a merger is also similar, in fact, probably worse. In a secondary, once it has been marketed, the stock has been voluntarily purchased. In a

° The case of *Henry F. DuPont v. Commissioner*, (1943), 2 Tax Court 246, is in point, legally and economically. There the gift tax value of 4.8% of all outstanding DuPont shares was involved. There was a good deal of evidence on market effect and a value of $135.00 was adjudicated. This was $18.00 or 13% below the quoted market value. The evidence and opinion is instructive and pertinent.

merger, sales are yet to come. This merger mortgages the future of DuPont share values. A great many analysts will not be so obtuse as to disregard this when the merger is made final even before the secondary sales make their impact on the market, and when the secondaries start coming they will be reminded that there is more to come from the huge blocks of Christiana holders. To say the market is so resilient, it will keep bouncing back is not demonstrable without making many assumptions as to unknown factors as Murtaugh's Exhibits prove to the hilt. And certainly isn't proved by showing a return to previous value after a month or two or three in a particular instance. The Christiana refund file, if I can get at it, I believe, will show Christiana is making the claim today that General Motors is still suffering from the shares distributed in blocks to large DuPont holders. I agree with Christiana in this contention and I affirm that it is an incredibly naive or dissembling attitude to claim that the impact problem doesn't exist in this situation looking to the future if not to the immediate present.

5. THERE IS NO WORTHWHILE EVIDENCE TO NEGATIVE THE LIKELIHOOD OF ADVERSE MARKET IMPACT FROM THE MERGER OR SUCCEEDING SALES.

In its report filed as an Exhibit to the Application for Exemption and introduced into evidence, the sole reference of Morgan Stanley on the question of market damage, was quoted in Charles Townsend's testimony (Tr. 53). There was nothing in the Application for Exemption on this point so nothing digested in the Commission's condensation which was sent to shareholders. The sole reference in the extensive Morgan Stanley report was the deterrent affect of potential capital gain taxes on sellers. This is garlanded in the record by the testimony of Mr. Charles Townsend (Tr. 53 to 56). He had no doubt that some stockholders

would obviously sell (Tr. 56), but if holders of large blocks chose to sell, for instance if some of them died and their bases moved and they had to pay estate taxes, they would sell through underwritten public offerings. "Now underwritten public offerings do have market effects. We know that. But these if done in a proper manner are modest in size and not extensive in length (Tr. 56), all this statistically unverified deductions he recited "led us to make if you will an informed (sic) judgment that there would not be a material or lasting effect on the market for DuPont." After discussing a series of secondaries in joint Exhibit 6, he concludes, that in organized secondary offerings there is frequently an adverse market impact. But if the offering is done well and made properly, this impact will disappear over a period of time following the issue. (Tr. 64) Getting concrete, he estimated a one to three month impact (Tr. 65) from marketing 10% of DuPont over a five year period which would be dissipated after each issue (Tr. 65). Provided the market was not overtaxed, there would be no lasting impact (Tr. 66).

Mr. Charles Townsend has the cool calm air of a man with all the answers but with enough good legal advice to use weasel words, make many assumption, assume a good market, assure Morgan Stanley would control, overlooking the fact that on best efforts offerings, there is no control at all, assuming that there would be no mishaps between the time of registration and the time a secondary reaches the market, assume that there will be no succeeding sales before the market effect of a prior selling is abated, assume there will be no helter skelter selling by the 4,000,000 shareholders of DuPont which will not be in any way affiliated or controlled,* assume that the 20% owned by

* Mr. Grimes testified that no attempt was made to determine the selling intentions of owners of the 4,000,000 non-affiliated shares (Tr. 657). The looseness of the ascertainment of sellers intentions of affiliates is appalling (Tr. 669).

charities would not be sold even if there is no tax deterrent, assume that no trusts would be diversified, assume there is a good market for DuPont at around the current price at any time, or if not that the demand will be generated somehow within a very short period to restore the price even though a person who is interested in DuPont knows that he can wait for the next market impact situation, and finally assume there won't be any sales any how, without any real basis or investigation such as his firm made for the Relief Proceeding. We realize Morgan Stanley are professional gladiators in this field, serving DuPont in one case, the divestiture (lots of impact), serving DuPont in an opposite stance, in this case (no impact) and serving Christiana in the refund case (lots of impact). Everything is predictable in this case with calm assurance. In the other instances at best you never can tell when the probabilities are that there will be damage. (A word might be said for that DuPont shareholder, whether a former Christiana shareholder or not, who has to sell his shares for personal reasons or feels he has to during the period of market impact. He was very much the object of sympathy in the Relief Proceeding but is disregarded here). Mr. Edward Townsend of First Boston Corporation said he relied on the advice of counsel for the other side for the fact that no one knew of any selling intentions, that it was a pure guess on his part as to what actual inquiries had been made (Tr. 402). There is no mention of market significance in his report. It seems clear that he was asked to do a segment of the job making the assumption as to terms apart from whether or not there would be market sales.

The Kidder, Peabody Report states that counsel is not aware of any plans to register and sell DuPont. This simply indicates no affirmative information at all. It also weakly draws an inference of no profit taking from a lack of volume of Christiana shares, when the merger caused

a rise in Christiana prices. This is rather absurd since the rise never reached the merger ratio. However Kidder Peabody did not go out on a limb in their report, because in the Exhibit 2 to its financial statements accompanying the report there is the following language: the report assumes "that there will be no registration and subsequent sales of DuPont stock received in the merger by major Christiana shareholders".

Mr. McCoy's testimony on cross-examination dealing with sellers and market impact begins on Page 944. He knows of no survey (Tr. 940). He knows that there are only 332 shareholders of Christiana who hold over a thousand shares and 99.5% of the outstanding Christiana shares (Tr. 945), but he personally wouldn't answer any questions about selling near term (Page 941) (and so wouldn't dream of asking presumably under the golden rule). See also Shapiro (Tr. 788). He testified that he was satisfied that the merger would not have a harmful market effect (Tr. 948) though it is not based on any study. He doesn't think anybody could answer on harmful market effect or that anything could be done to produce greater certainty. (Tr. 948) DuPont had no trouble on the First Occasion, the Relief Proceeding, making all sorts of studies. The evidence put in by the Applicants for Exemption which is in the record is puny on the market impact issue and Amendment No. 6 filed after the notice and after my Request for Hearing stating that the special board committees had considered the possible immediate and longer term effect of the merger transaction and discussed this aspect with the advisors and received opinions, then there would be no significant or prolonged adverse market impact on the market for DuPont shares as contrived and unsupported in the reports and in testimony. The issue was buried, avoided and not considered at all.

If there was even a little diligence or sense of responsibility for getting some of the big holders on the dotted line agreeing to withhold substantial percentages for a period with escape clauses such as for death and taxes, there might be some argument that consideration had been given the security of the price of DuPont in the market, though then still would be the problem of a company business purpose and an arms length price. In fact, if the Commission as to this aspect conditions its approval on there being a supplementary provision in the agreement with respect to affiliated shares which will put in writing what is being asserted in the record, this would be a very affirmative thing. The affiliates are to sign agreements with respect to registration in any event. I tried to lay the groundwork for this suggestion with my unanswered letter of November 22, 1972, (the last sheet of my Application for Leave to Intervene as a Party). The agreement with respect to registration is full of great privileges, and instead of being a protection for the market of DuPont shares indicates ominously that there will be, at DuPont's expense, much recourse to the market and that the financial community will soon learn and correctly appraise the situation. There seems to be some desire to persuade the Commission that the agreement for half-yearly registrations will only result in sales on the New York Stock Exchange. This no doubt is to get rid of the unfavorable inference of too often replated secondaries. However, the record clearly shows that this is not true. (Tr. 663)

MURTAUGH BRIEF, p. 58

Mr. McCoy was evasive to say the least about the control transfer by Christiana, or acquisition of control by management. His testimony on this begins on cross-examination at Page 930. However, he did volunteer that management had no reason to be concerned about lack of power. The management had the power. A raid from someone acquiring Christiana or Christiana shares is a possibility. On direct examination Mr. McCoy said that he saw the merger as a solution to a long time problem, breaking up the Christiana block so that somewhere down the line it could not fall into factional groups. He said Christiana doesn't control, and issues no instructions, mandates, or vetoes. (Tr. 886).

In fact therefore, there is no real business purpose for DuPont here other than the protection of the unthreatened present and future management. The enhancement of their power or the elimination of potential management control is all without any demonstration of a need for the business but just a very far off down the road feeling that somehow things might be more comfortable.

9. This Merger As Proposed Should Not Be Approved.

It is quite understandable that the two members of the DuPont Special Committee should be especially sensitive to abating the power that threatens or potentially threatens the men at the top, (that's them, at this moment) and should easily translate this sensitivity into terms of tangible company advantage. It is also understandable that courts and agencies, and even some minority stockholders, will not indulge them in their understandable conscious or subconscious anxieties or ambitions. In order to sublimate they turn their stance into a moral issue,—it would be overreaching to demand part of the benefits flowing so abundantly to Christiana shareholders, but only flowing to DuPont shareholders in terms of 4 cents and getting Christiana off their back. The asserted Moral Issues are, on balance, against their merger. In the first section of this Brief, I made my argument as to the monetary value of making marketable, for Christiana shareholders, the DuPont shares which Christiana owns. This benefit does not come without a compensating disadvantage for all other DuPont shareholders, a vast and virtually uncontrolled increase in the supply of marketable stock. This is an assault on the law of supply and demand. There is a counter moral issue—what is being done to protect the price of DuPont shares by those who control its fate? Absolutely nothing. There are no tangibly worthwhile increase in earnings per share to provide an obvious economic counterweight in financial analysis and possible dividend increases. There are no restrictions on entry into the market beyond temporary oral assurances as to temporary thinking of some people.

It is unfair, unreasonable and overreaching of Christiana and its shareholders dominating DuPont, and holding its chief executives in chancery to abuse the statutory power they have to accomplish a merger as presently proposed for their own great benefit but to the detriment of the DuPont shareholders other than Christiana.

Respectfully submitted,

/s/ Lewis C. Murtaugh,
Trustee as aforesaid

BRIEF OF CHRISTIANA SECURITIES COMPANY,
pp. 28-32

equally clear, however, that Kidder, Peabody's study of precedents did not foreclose it from recommending a range of ratios within the realm of reasonableness which could be sustained on the basis of that firm's broad experience and expertise in the investment banking field.

2. Consideration of Alternatives.

Each of the financial advisers—and the special negotiating committees as well—inquired as to whether Christiana had any alternative means of achieving the benefits that would flow to it and its stockholders from the proposed merger (Tr. 47-50, 328-329, 497). The reason for this inquiry was not to determine whether the merger should be consummated nor was it designed to ascertain the definitive terms upon which any merger might be appropriate. Obviously, a merger was immediately available to Christiana if it could be negotiated on fair and reasonable terms. Therefore, the concern whether alternatives existed merely represented an attempt to determine whether some limits would have to be placed on the size of any discount from net asset value Christiana might be asked to relinquish in the merger (Tr. 49-50, 313, 487). In other words, if a reasonably available alternative to merger existed which could be consummated at a cost to Christiana that would result in no discount from net asset value, it would then be difficult for Christiana or Du Pont to justify a merger embodying any such discount. Similarly, if the cost to Christiana of implementing an alternative amounted to, for example, a 1% discount from Christiana's net asset value, it would be difficult to justify any larger discount in the merger exchange ratio. However, even if there were no alternatives available to Christiana

other than merger with Du Pont as a means of achieving the advantages of this transaction, Du Pont realized that it would not be free to extort an exorbitant price from Christiana that might amount to overreaching on its part. And indeed, as a practical matter, since Christiana was under no compulsion to merge with Du Pont and could well have remained as an investment company for the indefinite future (as it had for almost 60 years), Du Pont recognized that any merger terms would have to be fair and reasonable to both parties and could not reflect any attempt to obtain an unreasonable financial benefit from Christiana for effecting a transaction which was mutually beneficial to both companies apart from any discount (Tr. 714, 770).

It was in this context that the financial advisers considered possible alternatives to the proposed merger.

(a) *Section 333 Liquidation*—At one point early in the negotiations, it was suggested that Christiana might be able to liquidate under Section 333 of the Internal Revenue Code. While it appeared at first that a liquidation under Section 333 could be consummated with a federal tax cost to Christiana's stockholders of between $38 million and $70 million, subsequent analyses of Christiana's "earnings and profits" and "stock or securities acquired after December 31, 1953" which control the potential tax liability showed nothing more than tremendous uncertainty as to what the tax liability might be (Tr. 49-51, 288-289). This was not simply a matter of mathematical calculation. The definition of "earnings and profits" subject to taxation is far from clear in the tax laws and the Internal Revenue Service will not give advance rulings in this area.[14] Christiana's tax picture was further clouded by various distributions of General Motors common stock re-

14. *Rev. Proc. 72-9*, I. R. B. 1972-1, p. 28, Section 3.017.

sulting from the antitrust divestiture decree entered against Du Pont and by the Delaware Realty merger. Thus, in soliciting stockholder approval of a Section 333 liquidation, Christiana could not explain to them what the tax consequences might be.[15] In those circumstances, stockholders would in effect be voting tax litigation for themselves were they to sanction a liquidation under Section 333.

The absence of Section 333 as a presently existing viable alternative for Christiana did have some impact on the negotiations and on the recommendations of the financial advisers, at least in the case of Morgan Stanley and Kidder, Peabody (Tr. 49, 498-499). Although First Boston was interested to hear of the elimination of Section 333 as an alternative, it did not alter its recommendations when the "death" of Section 333 was formally announced

15. The computation of Christiana's "earnings and profits" is complicated by a number of factors:

(a) the fair market value of the General Motors stock received by Christiana pursuant to the antitrust divestiture decree against Du Pont is the subject of a tax refund suit by Christiana against the United States Government and is thus presently indeterminable;

(b) the effect of pro rata distributions by Christiana of General Motors stock to its own stockholders is uncertain under the tax laws; and

(c) the effect of distributions by Christiana of General Motors and Hercules Powder Company stock in exchange for Christiana's own stock is uncertain under the tax laws (*Compare* Rev. Rul. 70-531, 1970-2 C. B. 76; *William D. P. Jarvis*, 43 B. T. A. 439 (1941), *Nonacq. this issue*, 1970-2 C. B. xxii, *aff'd*, 123 F. 2d 742 (4th Cir. 1942); *Herbert Enoch*, 57 T. C. 781 (1972)).

The determination of Christiana's "stock or securities acquired after December 31, 1953", which is the other factor which determines how much gain is recognized in a § 333 liquidation, is complicated because it is not clear whether the Du Pont stock received by Christiana in its merger with Delaware Realty can be regarded as stock acquired before January 1, 1954.

to all three advisers after June 30 (Tr. 313).[16] Morgan Stanley, upon learning of the elimination of Section 333, increased the range of its recommended discount from a maximum of 2% to 2.5% (Tr. 50). As Kidder, Peabody's representative testified, the elimination of Section 333 required Kidder, Peabody to determine what range of variation around net asset value, considering the other factors in the transaction, would be fair and reasonable. Recognizing that "finance is not an exact science," Kidder, Peabody concluded that an appropriate range would be from a premium of 2% to a discount of 3% (Tr. 499-50).

The elimination of Section 333 may have enhanced Du Pont's bargaining position by removing this potential "floor" on any discount from net asset value (Tr. 715-716). At the same time, the Du Pont negotiators sensibly recognized that they could not force Christiana to accept an unreasonably large discount that might reflect overreaching on the part of Du Pont (Tr. 716).

16. On June 30, 1972 each of the three advisers made a written and oral presentation to the special committees of both Christiana and Du Pont, indicating their preliminary recommendations. At that time, Section 333 was still considered a possible alternative to Christiana and thus provided a potential "floor" on any discount of between $38 million and $70 million—or about 1.7% to 3% of Christiana's net asset value.

Administrative Proceeding
File No. 3-3928

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
MARCH 19, 1973

IN THE MATTER OF
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)
Investment Company Act of 1940

APPLICANTS' JOINT PROPOSED FINDINGS AND CONCLUSIONS

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. . . . Six directors of Du Pont also are directors of Wilmington Trust Co., three of whom also are directors of Christiana.

Christiana Ex. 4 Grimes, Tr. 643-58
Du Pont Ex. 5 (pp. 1-2)

11. Du Pont Common Stock and the Du Pont $4.50 Preferred Stock are listed on the New York Stock Exchange. Christiana common stock and 7% cumulative non-voting preferred stock are traded in the over-the-counter market. The reported range of market prices for Du Pont Common Stock for the period January 1, 1970 through September 30, 1972 are set forth below:

	Du Pont Common Stock	
1970:	*High*	*Low*
1st Quarter	$108.75	$ 92.50
2nd Quarter	121.50	97.13
3rd Quarter	128.00	111.00
4th Quarter	134.25	114.00
1971:		
1st Quarter	148.00	129.50
2nd Quarter	152.00	134.75
3rd Quarter	158.00	139.50
4th Quarter	157.25	133.38
1972:		
1st Quarter	175.50	144.25
2nd Quarter	176.50	159.13
3rd Quarter	184.38	160.00
Closing Prices:		
April 28, 1972 (a)	168.25	
July 17, 1972 (b)	164.50	

(a) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(b) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New Stock Exchange.

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The reported bid and asked prices for Christiana common stock and preferred stock for the period January 1, 1970 through September 30, 1972 are set forth below:

	Common Stock				Preferred Stock			
	Bid		Asked		Bid		Asked	
	High	Low	High	Low	High	Low	High	Low
1970:								
1st Quarter	$ 99.00	$ 85.00	$103.00	$ 88.00	$ 99.00	$ 94.00	$103.00	$ 97.00
2nd Quarter	107.00	90.00	109.00	93.00	99.00	88.00	104.00	91.00
3rd Quarter	112.00	100.00	115.00	103.00	96.00	88.00	100.00	91.00
4th Quarter	113.00	101.00	117.00	104.00	99.00	95.00	102.00	98.00
1971:								
1st Quarter	129.50	112.00	131.00	114.00	106.00	97.00	109.00	100.00
2nd Quarter	129.00	120.00	138.00	123.00	106.00	95.00	110.00	99.00
3rd Quarter	141.50	122.50	143.50	124.50	100.00	94.00	105.00	100.00
4th Quarter	136.00	116.00	138.00	118.00	100.00	97.00	104.00	102.00
1972:								
1st Quarter	142.00	120.00	145.00	123.00	99.00	98.00	104.00	101.25
2nd Quarter	166.50	140.00	173.00	143.00	102.00	97.00	106.00	102.00
3rd Quarter	195.50	160.00	205.50	165.50	106.00	100.00	none	none
Closing bid price								
April 28 (a) ..	147.00				100.00			
July 17 (b) ...	167.50				100.00			

(a) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(b) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New York Stock Exchange.

Du Pont Ex. 5 (p. 10)

12. Christiana common stock has traditionally traded at a discount compared to its underlying net asset value. Such discount is attributable principally to potential taxes on unrealized capital gains and to the intercorporate dividend tax. Over the two years preceding April 28, 1972, the date on which merger negotiations were announced, the discount was generally in the range of 20% to 25%, and was 23% on that date. In earlier years the discount frequently had been in the range of 15% to 20%.

Du Pont Ex. 5 (p. 4) Harter, Tr. 548
Joint Ex. 1 (ex. 9) C. Townsend, Tr. 210-11

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24. The following tabulation sets forth certain actual and pro forma (after giving effect to the merger, based on the proposed merger terms) data for Du Pont and Christiana for the periods and dates indicated, to illustrate the effects of the merger on per share net earnings, dividends and market value.

	Six Months Ended June 30, 1972	*Year Ended December 31, 1971*
DU PONT COMMON STOCK		
Net earnings per share:		
Actual	$ 4.39	$ 7.33
Pro forma	4.41	7.37
Dividends per share:		
Actual	$ 2.50	$ 5.00
CHRISTIANA PREFERRED STOCK		
Dividends per share:		
Actual	$ 3.50	$ 7.00
Pro forma	1.83	3.66
Market value per share at end of period:		
Actual	$100.00	$100.00
Pro forma	120.00	120.00
CHRISTIANA COMMON STOCK		
Net earnings per share:		
Actual	$ 2.64	$ 5.28
Actual, adjusted to equity method of accounting (a)	4.66	7.76
Pro forma	4.95	8.28
Dividends per share:		
Actual	$ 2.50	$ 5.25
Pro forma	2.81	5.62
	April 28, 1972 (c)	*July 17 1972* (d)
Market Value Per Share: (b)		
Market value of 1.123 shares of Du Pont common stock to be exchanged for each share of Christiana common stock	$188.94	$184.73
Market value of a share of Christiana common stock	147.00	167.50
Increase in market value:		
Amount	$ 41.94	$ 17.93
Percent	28.5%	10.3%

[See following page for footnotes.]

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(a) Christiana's actual net earnings adjusted to include equity in the undistributed earnings of Du Pont and The News-Journal Company.

(b) Based on closing market price for Du Pont Common Stock on the New York Stock Exchange and closing bid price for the Christiana common stock in the over-the-counter market on the respective dates.

(c) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(d) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New York Stock Exchange.

Du Pont Ex. 5 (p. 9).

UNITED STATES OF AMERICA

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

Administrative Proceeding
File No. 3-3928

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CHRISTIANA SECURITIES COMPANY
E. I. DuPONT DE NEMOURS AND COMPANY
Wilmington, Delaware

(812-3224)

Investment Company Act of 1940

—

SUPPLEMENTAL PETITION OF LEWIS C. MURTAUGH, TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56 FOR REHEARING INCLUDING A MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

LEWIS C. MURTAUGH, Trustee for Emanuel and Helen Steib under Declaration of Trust Dated 8/30/56, files this Supplemental Petition and Motion pursuant to Rule 21 (d) and (e) and as grounds therefor, sets forth the following:

1. The decision ignores the criteria for weighing a transaction in which one group controls both sides of the transaction and gets advantages in a "consensual" setting which is tremendously more to its advantage than the subservient party to the transaction obtains. The criteria for weighing a merger are well settled in law where both sides are under common control. This calls for an arm's length bargaining, or at least a resultant transaction that can be

reasonably construed as a result which would be produced by arm's length bargaining. This is so well established in law that it does not seem possible that such transaction could be validated as fair and reasonable and not overreaching because of the 1940 Act. If the Commission in its interpretation of the Act finds that the standards as it interprets them under the Investment Company Act of 1940 will prevent the kind of agreement that can be fairly said to result in an arm's length bargaining outcome, then so be it. This should be equivalent to saying there can be no merger. This does not leave Christiana in an impossible position for it can, if it wishes, liquidate and, of course, it can market its DuPont, or it can maintain the status quo. (Incidentally, controlled DuPont has no options at all except the "protection" afforded by the Investment Company Act of 1940 and its resort to chancery through a derivative suit). An arm's length result is the kind of a result that a willing buyer who doesn't need to sell and a willing seller who doesn't need to buy will agree upon. This is certainly true in the purchase of asset cases from controlling shareholders, and there is no reason why the same standards should not be applicable in judging this consensual transaction.

2. Were Christiana to go to DuPont and offer DuPont one Christiana share for every 1.15 DuPont shares and through its control seek to have the transaction put through, there seems little doubt that there would be equitable relief given. The Opinion is giving support to the question begging statement that a share of Christiana is essentially the same as a share of 1.15 shares of DuPont would hardly approve the purchase of Christiana shares for 1.15 shares of DuPont absent a merger, when DuPont could go into the market and purchase Christiana shares at ⅞ of the price of a share of DuPont, procuring the money

say, by selling DuPont shares in the market, or, of course, using DuPont's own present resources. Suppose Christiana should force DuPont to budget a certain amount a year and buy Christiana shares, say on a lottery basis, to avoid insider favoring, for an amount equal to Christiana net asset value. This would hardly survive.

3. The fact that the fashioners of Delaware law of whom DuPont is certainly a motivator has lessened stockholders significance until it almost represents true insignificance, should not persuade the Commission that it should roll with the punch. Since the *Delaware Realty* decision in 1961 Delaware has, among other things, reduced the requirement for approval from ⅔ to 50% and eliminated the rights of dissenters to obtain a valuation of their shares. Your objector appreciates the Cary citations, and the text in Footnote 40, but respectfully submits that eliminating an arms-length transaction standard or result is a backward rather than a forward step, and is not consonant with the spirit of the Cary approach.

4. The important transfer of the control aspect is treated tangentially on Page 15. The 1940 Act was not intended to foster the acquisition of control by managerial groups. This is what is happening now and it deserved more of a focus. See Murtaugh brief beginning on Page 55. The fact that it is not DuPont's assets that are being invaded to get the market price of relatively few shares traded in round lots for the thirteen and one half million shares of Christiana, thus possibly hurting DuPont's operations and consequently its share prices, but rather that it is DuPont's share values that will bear the brunt by reason of the way this transaction is structured is economically immaterial. DuPont's shareholders will pay the price of Christiana's transfer of control to management either way.

5. If DuPont and Christiana bargained for a cash purchase by DuPont of Christiana's DuPont shares, would the Commission feel compelled to insist that the sale must be at market value? Suppose the parties agreed to a 10% discount? Would the Commission feel that this violated the spirit of the 1940 Act being, in effect, selling Christiana shares at a discount? Piercing the corporate veil to rationalize a tremendous advantage for insiders with a controlling influence in the transfer of their controlling shares is certainly not the typical equitable circumstance in which courts disregard separate corporate entities.

6. It is commonplace in a commercial transaction that the mere agreement on a price is only the beginning of bargaining and that an entire transaction as it is fully implemented may greatly enhance the worth of the transaction to one side or the other. For example, if a person agrees to sell a portion of a land holding with certain buildings thereon, an important consideration might be that the equipment in the building will be considered real estate or in any event be included in the deal. It may turn out that the seller wants to retain an easement for convenient access or wants to maintain some element of control over the development of the land to be sold such as the character of the improvement or their location with reference to the land his is retaining. Or, for example, if parties are negotiating over employment and fix an agreeable salary before deciding on work schedules, work location, scope of activities and responsibilities, the deal has hardly begun with the salary matter settled. This is especially applicable to the DuPont-Christiana merger. After a raw price of 1.123 shares of DuPont for each share of Christiana agreed upon, the parties still did not develop to any extent the matter of registration rights or the terms by which DuPont would protect itself so that it could live

within the rules of the Securities and Exchange Commission relating to insider sales and within the economic laws of supply and demand in connection with sales facilitated by registration requirements. In fact, the agreement was no where near in final form when the Application was filed and its terms were adjusted dozens of times before the agreement to merge was signed in December of 1972, and as of January 3, 1975 at a conference between all parties and the judge in the derivative suit, we were advised that the agreement still wasn't final and signed. It would seem the carefully crafted document is waiting for the final crafting concession and the hope is that it will ride the coat tails of this decision.

7. Although it may be true that such an agreement need not under Delaware Law be passed upon by the shareholders, it seems clear that this agreement, insofar as it dealt with registration rights, is the kind of an agreement that is prohibited under Section 17(d) of the Act, unless an exemption is granted. To make this even more clear, suppose Christiana was not proposing to merge but just proposing to make DuPont enter into a contract to register indefinitely in the future its DuPont shares in accordance with the terms of the registration agreement. Surely DuPont shareholders would have a right to object to the market damaging circumstances which the unlimited access to the market would provide for Christiana especially if there was little or no consideration given for this. In the Registration Agreement, DuPont surrenders for an indefinite period in the future its right to have any control over non-underwritten secondaries twice a year and underwritten secondaries in excess of 25 million dollars once a year.° Furthermore, it agrees to hold the sellers harmless

° A commitment into the future was barred by the Commission in the 1940 Act case *The Variable Annuity Life Insurance Company of America (1960) 39 SEC 680, 692, 3.*

from any violations of the Securities Laws and the regulations which may be asserted. It is thus unable to protect the market for DuPont shares when, in its opinion, it would be disadvantageous to have additional shares issued, and it further subjects DuPont to continuous liability or claims of liability arising out of the ever-spreading field of liability involving registration. While DuPont may have some rights of exoneration if registration defects are caused by the sellers, this will not protect it originally nor insure recoupment. Incidentally, the opinion seems in error when it states that the registration is to be at the sellers' expense. DuPont is to supply its employees and its facilities without any recompense. I have preferred to state it that the registration is at DuPont's expense except for out-of-pocket disbursements.

8. In footnote 72 of the Opinion there is a reference to Section 17d of the Act and it is stated that no issue has been raised with respect to it but that the standards of this section have been satisfied. Naturally, it is believed that the entire Murtaugh brief raised substantial points on all aspects of this transaction and while the Registration Agreement may not have been attacked specifically by designating Section 17d and the rules thereunder, the references in the Murtaugh brief to the Registration Agreement and the great privileges it confers clearly raised the issues in Sections 17d and Rule 17d-1(a) and (d). Your objector is willing to acknowledge that prior to this encounter he had no experience with the Commission or the statutes or rules under which it operates. If the issue is not deemed clearly raised by the Objectors, we would like to raise them here to qualify it as one of the issues which might be raised on appeal. The material in Murtaugh's brief at Pages 45, 46 and 51 seem fairly to raise a Section 17d issue in particular but the spirit of the rest of the brief

and of the original Murtaugh's letters to the Commission attached to the Application For Leave To Intervene certainly raise the issue of Section 17d as did Amendment No. 6 to the Application for Exemption.

9. It now seems apparent that part of the difficult and troublesome aspects of this case arise precisely because the Registration Agreement is not before the Commission under Section 17d and the parts of Rule 17d-1 which are applicable. It is the firm opinion of Murtaugh that it would be far better for DuPont shareholders to have a merger at no discount from net asset value and with no provision for registration. This would be consistent with the interpretation the Commission puts upon the Investment Company Act of 1940 when it extends other sections of the Act which prohibit the issuance of shares for less than net asset value to make-weight a "spirit" to govern the result here. It should also be pointed out that in the event of a merger with no registration rights granted and with no discount, Christiana shareholders would receive all of the benefits that they could have with a liquidation that was without any tax consequences. Thus Christiana is not being forced into a shareholder taxable liquidation if it will forget about forced registration rights.

10. It should be stressed that the Registration Agreement comes before the Commission only by reason of a last minute insertion in the evidence of the unfinished draft in the case by Murtaugh Exhibit 15 and cannot be considered to have been presented for the judgment of the Commission on its merits, nor was the hearing complete with respect to this nor was it even marginally an issue. This is even more obvious since it was incomplete and still is. This is probably the reason that the Commission feels rather helpless in devising suitable conditions, and taxes the Objectors with not coming up with specific proposals.

Nevertheless, Murtaugh in oral argument did come up with at least one specific proposal based upon the only evidence as to market impact offered by the Applicants which was that up to a total of 10% of DuPont's shares namely 4,700,000 shares could be marketed by secondaries over a period of five years with only temporary effects. Presumably this is as far as the professional witnesses were willing to go. Still its better than nothing. The Commission, however, is willing to go all the way which, of course, is protested and objected to. We may have taken an important step to resolving the market impact issue if attention is focused on the fairness and scope of the registration rights, as well as on the need for them at all. There is less reason to assume that DuPont will not be cooperative in registrations for these influential shareholders if this is not harmful to DuPont and its shareholders generally than there is to assume that DuPont can depend upon the interest in DuPont and its shareholders generally of the new DuPont shareholders who have ironclad rights to register carved out for them by the Registration Agreement regardless of DuPont or its other shareholders interest. As stated previously this is the situation Christiana shareholders would be in if they could have a tax free liquidation, one of the daisy paths down which the financial advisors were lead to keep them from factoring in the market value of Christiana in determining the fair ratio of exchange. (The other daisy path was the assurance of virtually no selling.)

11. The fact that DuPont management agrees to Christiana's suggestion of a merger is of little significance, once it is fully understood that the holders of Christiana control the Finance Committee and the Nominating Committee for the directors of DuPont, and the way to promotion and pay for all those not retired, and to positions

well compensated on committees of directors for those who are retired makes for a situation where DuPont interests are forcibly identified with Christiana's. Out of 26 directors of DuPont only two were newcomers who might be classified as outside directors, who might have performed a significant function as members of a negotiating committee, but were barely kept informed, if that.

12. Certainly the quoted language of the Section 1 of the 1940 Act refers to the dominant persons in this DuPont-Christiana setup. There is no possibility that the dominant persons in Christiana are likely to do something to favor DuPont as against the interest of Christiana shareholders. To convert the Act into an additional shield for Christiana's use of its controlling interests is to pervert the Act. It would be far better for DuPont if the Act had never been passed.

13. The Commission construes the Act as leaving it no alternative under the circumstances. As stated above this is an abrogation of the concept of an arm's length dealing, or a result equivalent thereto, as the opinion recognizes. This is especially obnoxious in transfer of control situations where one side is greatly enriched and both sides are governed by one side. The market impact matter, more or less conceded in the Opinion, or at least demurred to, even if not pertinent to Rip Van Winkle type investors will certainly keep short term investors, and even mere tape watchers on nervous alert and keep prudent new long term investors on the side line, and will keep those in the inside peeking to see if the others are truly asleep so that they can diversify into some other long term investment without an overhang. Naturally, there will be an investment appeal when DuPont drops enough but there is no reason to assume that it will rebound equivalently to the drop. Certainly the knowledge of the prob-

ability of more stock being marketed will haunt the market and prevent the recovery so clearly predictable by the Opinion. This was the essence of the divestiture case evidence and in large part the divestiture evidence was the strength of the refund claim (ignored by the Opinion). As estate taxes mount on older generations creating new bases, even the tax deterrent will be gone as its now for the ⅛ of Christiana shares held by charities and the known 5% or so of heirs of decedents who died when the price of both DuPont and Christiana were much higher than present sale prices.

14. The insight which led the Commission to make its ruling in *Fifth Avenue Coach Line, Inc., 43 SEC 635-639* is absent from the present opinion which focuses exclusively on the interest of the security holders in the Investment Company and turns its back on the interest of DuPont shareholders generally. There is much language in the law, in the rulings and in the cases which indicate that there should be alertness to make sure that the laws and regulations are applied with in-depth perception and a studious scrutiny of the acts of controlling people.

15. The statement that in "economic reality Christiana stock already is DuPont stock under another name" begs the question, can only be true if the Commission and the directors disregard truer economic realities. The inherent tax disadvantages to Christiana and its market valuation not to mention the separate legal entities and the fact that economically the vastness of its holdings of DuPont made its investment unrealizable at the market price of a few shares. Furthermore this blockage factor will cease to be academic when the holders of huge blocks of Christiana come to market to diversify their holdings. Many holders of Christiana hold in excess of 100,000

shares and many more hold shares in five figures. To equate the value of the shares of a person holding 100,000 shares of DuPont with the value per share of a holder of 100 shares is utterly unrealistic.

16. The discernment which particularizes on the income tax burden on high bracket Christiana shareholders who will be able to get 7.27% of taxable income is misplaced. In this day of tax shelters it is notorious that many high income people pay very little taxes. However, the advantage of receiving taxable income should stand on its own two feet without deprecation because of income taxability. Damages for loss of income would not be less because taxable.

17. It is interesting that the only authority cited in the entire opinion on the arms-length bargaining concept is *Atlas Corporation 37 SEC 72 85-86 (1956).* Naturally a close reading of that opinion is in order. This was a merger of many companies, the shares of which were held in various proportions by the holding company. The value of the properties of the portfolio company in question, Albuquerque, defied clear analysis since it involved estimated future net cash realization from oil and gas reserves. There was also much consideration of capital gain taxes which might be avoided if a liquidation alternative was adopted though this would involve a capital gain tax on the shareholders and "appropriate weight" was given to several tax factors. The net asset values were weighted by reason of the tax factors and the fact that Albuquerque would have a much broader and more active market than the shares they presently held and would receive dividends, not presently being paid on Albuquerque, was weighted into the picture. Out of all this, an apparent 4% discount from net asset value was approved. We would

be glad to use most of the concepts resorted to by the Commission in weighing the Albuquerque-Atlas merger. It certainly shows no single-eyed concern for net asset value. Overall it gives more support to the objectors' position than it does to the applicant and it finds a fair result from numerous factors which quite reasonably would have been the result of arms length bargaining. If this is the only decision (or language) that the Commission can point to, we are indeed breaking new ground here.

18. To downgrade the threat to DuPont's share prices as the Opinion offhandedly does by its casual reference to Wilmington Trust Company sales is to escape reality. Failing to take more fully into account the positive need for Wilmington Trust Company to diversify a billion dollars worth of new DuPont shares is to trivialize the role of Hamlet. *Furthermore, it goes right to the fairness issue.* We have much information discovered and more in process of discovery to give dimension to this. This was an important matter in connection with fixing the ratio. Edward Townsend of First Boston Corporation testified that if there were going to be substantial sales that would have to be taken into account in fixing a ratio and he recognized this might kill the merger,[1] and even Charles Townsend of Morgan Stanley agreed it would be an important factor [2] but kept insisting that there would be no substantial sales. Kidder Peabody's opinion was qualified by the assumption there would be no sales.[3] There is an eco-

1. Tr. 402.
2. Tr. 191.
3. Exhibit 2 to the Kidder Peabody report states:
   "Our report is based, among other things, upon the following assumptions:
   . . .
   (xi) That there will not be a registration and subsequent sale of DuPont stock received in the merger by major Christiana Shareholders."

nomic limit on the amount of DuPont securities which can be marketed in the single secondary. This is far less than Wilmington Trust Company would bring to market were it not for this factor. This means for Wilmington's needs alone that there will have to be several secondaries and this overhang will exert continuous depressing effects on the market. Both Emerson of Morgan Stanley (Murtaugh's brief, Page 21) and Lenz of Merrill Lynch (Murtaugh's brief) testified that there would be a continuous 10% to 15% decrease in the price of General Motors' shares simply by reason of the sale by a trustee of .7% a year of General Motors shares which would be offered over a ten year period and this was even though the trustee was given some leeway to avoid unfavorable timing. This testimony was given in answer to an inquiry as to what would be the result if Congress passed a bill to make the distribution of General Motors shares completely tax free. The opinion of Judge LaBuy 177 F. Supp. 1, 31 states the following:

> "Lenz also gave his opinion as to the effect of the Government plan in case a bill such as S. 200 passed and the du Pont Company made one distribution of the 63,000,000 shares of General Motors, but where the trustee still sold shares going to Christiana and Delaware in ten equal annual installments. He estimated a 10% to 15% decrease in market price."

Instead of 7% spread over a period of ten years here Wilmington alone is getting over 15% of DuPont at one time. Anyone who thinks Wilmington will not be far below 8% in less than 10 years is certainly unworldly.

19. The distinction between "market value" and "fair market value" which is made in the opinion is tendentious. It apparently is on the basis of this that the Commission

ignores the refund suit wherein Christiana claimed that it was entitled, in fairness, to a substantial discount from the quoted market price of General Motors shares distributed to it (2½%—1962, 1⅔%—1964, 2½%—1965). Christiana is getting over 28% here in one year and controlling both sides of the transaction insisting upon getting the quoted market price of traded round lot shares. Fairness was the issue in the refund suit. Unfairness to holders of General Motors and DuPont shares was the issue in the divestiture proceeding before Judge LaBuy. "Fairness," is a soluble word introduced into the act in Section 17. The fact that Congress omitted the word fair in another section to prevent dilution of existing Investment Company shareholders' proportionate interest in assets and restricted sales to the total market price of its portfolio assets is in no way controlling or even persuasive in the general concept of a fair transaction under Section 17. This would be evident were Christiana merging say with American Telephone or General Electric. At the conclusion of the hearing I made the point that I had only been given in connection with the refund suit the opinions of Morgan Stanley and Merrill Lynch in exhibits in the case. I also asserted my belief that further investigation would yield much more information in support of the claim that Christiana was making. This has proven to be the fact. Much information has been developed by discovery in the derivative suit as to assertions by Christiana on the question of the fairness of its being taxed on the basis of the quoted market price of round lot trading multiplied by the number of shares it received. Great emphasis was laid in the refund suit upon the fairness issues in the divestiture case which, of course, was not related to "fair market value" but unfairness because of market impact. This information relates to fairness which is the name of the game we are playing here.

This evidence, of course, would be introduced on a rehearing. It is respectfully protested that the constant presentations of DuPont and Christiana as to what is fair in the derivative suit and what is fair in the refund suit should have a bearing on the Opinion of the Commission on the issues in this case. It is not very complimentary to assume their contentions and evidence were not sound (not true?) and shouldn't be held against them, while the point of view they vigorously fought is sound after all (and so rewarding).

20. The Opinion exhibits a special interest in the relatively few people, in terms of shareholdings, who have invested in Christiana over the years with a full knowledge of its characteristics and the discount from the net asset value of its DuPont shares, though it yielded to a purchaser a distributable dividend after taxes which is about 7½% more than a purchaser of DuPont would receive, though DuPont sold 13% higher per share. It is an unfair approach to this matter to consider the market value of Christiana only as against the market value of 1.15 shares of DuPont. The average purchaser of Christiana, say just prior to the merger talk, could see that DuPont was selling at $168 and Christiana with 1.15 shares of DuPont was only selling at $146, and he would undoubtedly reason that Christiana was good as long as DuPont was good and that instead of DuPont's $5 dividend on a $168 investment, he could get $5.38 in dividends on Christiana for $22 less in raw market price for a share of Christiana vs. DuPont. There would always be a higher yield on Christiana as long as it maintained its declared policy of paying out on all its DuPont dividend minus 7.2% tax burden and it suf-

° Edward Townsend of First Boston Corporation was quite emphatic that Christiana's market price was its full value intrinsically and its net asset value was not an index of its true value (Tr. 383) and that it was not underpriced. (Tr. 404)

fered only a .3% operating expense. The largesse of the increase in the principal value of his holdings, about 33%, may have been part of the larger scheme of the DuPont family as it zealously propagated its posture of non-control of DuPont, but it hardly was in the minds of most of the ordinary investors of Christiana. If so, they undoubtedly would have bid up the price over what seemed to be a typical ratio of the prices of closed-end investment companies and to the net asset value of their holdings.

21. The assumption that some of the 338 large holders of Christiana may be wholly unconnected with the founding family or its collaborators at its birth is nowhere supported in the record. If it is significant, it should be there. If not, it should be deleted. It unfairly tends to add dimension to the argument discussed in the preceding paragraph. Mr. Justice Brandeis said in *The Chicago Junction Case, 264 U. S. 258, 263,* "Facts conceivably known to the Commission, but not put in evidence, will not support an order. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431.* . . . to make an essential findings without supporting evidence is arbitrary action." The same observation is applicable to the historical material gathered by the writer of the Opinion which is entertainingly written but also is not based on anything in the record and comes from relatively casual sources. I might suggest that the Opinion could be improved in this respect if the data were derived from contexts more familiar to lawyers which are fortunately available. In *U. S. vs DuPont, 177 F. Supp. 1,* a short but rather careful relation of facts may be found beginning at Page 36. A more detailed account of the family controversy is to be found in the case of *DuPont vs. DuPont (3 CCA, 1919) 256 Fed. 129.* Under general principles it would seem that if his-

torical matters are relevant and contribute to the solution of a problem that they should be in the record. I have no objection to deriving material from the record in other contested matters such as above cited. Of course, I very strongly feel that the material in the General Motors divestiture case before Judge LaBuy and in the Supreme Court are important historical matters which are much more relevant than what happened in 1915. Unfortunately, the Opinion turns away from this.

22. The dispersion benefit to DuPont hides the benefit that DuPont shareholders have from having a recourse, through Christiana with common interest to all DuPont shareholders, in the effective operation of DuPont. The Opinion recognizes this as to raiders. It is also a built in protection all DuPont holders now share but will lose. As an instance of what is meant, an article from Business Week of December 21, 1974 is attached. More than that it indicates not just immediate distribution but a wider market for DuPont shares because more will be available for sale. It is pregnant with the happy thought that the more wheat there is produced the more people will eat bread, without the burden of considering that this will be as a result of a lower price. The Opinion's narrow construction of dispersal, seems to be a crutch to support its later doubts or agnosticism about market impact, the latter feeding on the lack of evidence Murtaugh is cut off from producing.

23. The extended Opinion, in mass, unfortunately tends to obscure the difficult and troublesome problem of sanctioning this transaction as a result of anything but a recognition of raw power and dictation, unlike any conceivable arm's length result. Surely some diminution of a Christiana shareholder's bonanza in terms of ratio or conditions would hardly "inflict (sic) a really substantial detri-

ment" on Christiana shareholders. If sensitive but independent DuPont bargainers couldn't sleep nights after getting a somewhat better deal for DuPont, they would be fit subjects for psychiatry. Based on figures at the relevant time in 1972, let us restate the situation.

Christiana Shareholder Gets	*DuPont Shareholder Gets*	*DuPont Management Gets*
$42 in added *available* price.	$1.10 increase in equity per share (80 cents net).	Control •
7.5% increase in dividends.	3 cents increase in share of earnings, minus 28%	• Except it surrenders control of registrations
Liquidity.		
Registration rights.		
¼ free of restrictions.		
Tax free liquidation effect.		
Loses:	Loses:	
Possibility of transferring control.	Management responsibility to shareholders interests underwritten by Christiana's centralized interest in DuPont's operation.	
Voting Control	Effect of Market Impact of added shares.	
	Responsibility of directors to be guided by DuPont's interests from time to time in regard to Registration.	

24. In addition to the types of evidence this Objector would like to have the privilege of introducing on a rehearing, I respectfully request that the record include the following material which is on file with the Commission but should be in the record for convenient reference as to mat-

ters contained therein. If no rehearing is granted, we request, in any event, this material be included:

Notice of Annual Meeting of the DuPont Company dated March 7, 1973

Proxy for above Annual Meeting

Notice of Annual Meeting of Stockholders of Christiana Securities Company dated March 13, 1972

Semi Annual Statement Christiana Securities Company June 30, 1973

SEC Form N-1R filed by Christiana Securities Company for the year ended December 31, 1971

Wilmington Trust Company Annual Report for 1971

Wilmington Trust Company Notice of Annual Meeting of Stockholders dated March 16, 1972

Most of this material has been discovered as a result of the derivative suit. Much more material was discovered as described above and much material was also discovered which is not expressly defined but which it might be determined to be relevant in the event of a rehearing. The matters specified in this paragraph, however, are simply an aid to a court on review and to help them visualize the factual situation and various publicized statements and the interrelationships. If the Commission sees fit to have this material introduced, I will see that copies are sent to all of the parties of record as well as, of course, to the Commission. I do need the accommodation of the Commission or the Applicants in one respect as to filed matter. I would like to have in the record a copy of the Proxy for the DuPont Annual Meeting notice of which is referred to above. The only reason is to show that three directors of Christiana were three out of the four-man proxy committee composed of DuPont directors. I do not seem to have such a copy. I do not know if it would be proper to forward these instruments at this time without permission for a rehearing but if the Commission wishes me to follow this procedure, I shall immediately comply and I request the additional short time needed for this purpose.

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh, Trustee for
Emanuel and Helen Steib
under Declaration of Trust
Dated 8/30/56

LEWIS C. MURTAUGH
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[BUSINESS WEEK December 21, 1974 29]

EXECUTIVE SUITE

Who Did the Housecleaning at A&P

Leonard Dalsemer, a retired executive vice-president of International Paper Co., accepted an invitation last year to serve on the board of trustees of a charitable foundation. The foundation was the John A. Hartford Foundation, and last week a series of moves instigated by a committee of trustees headed by Dalsemer culminated in a dramatic management change at The Great Atlantic & Pacific Tea Co. The Hartford Foundation owns 33% of A&P's common stock.

In a board meeting at its new corporate headquarters in suburban Montvale, N. J., A&P directors elected Jonathan L. Scott, vice-chairman of the board and chief executive officer of the huge supermarket chain and designated him to succeed William J. Kane as chairman when Kane takes early retirement on Feb. 1. Scott, 44, the first outsider in A&P's 115-year history to serve as chief executive, had resigned two weeks before as vice-chairman and chief executive officer of Albertson's, Inc., a Boise-based regional supermarket chain with 288 stores whose estimated $1.04-billion in sales this year is small in comparison with the $6.8-billion that A&P should register in 1974 if sales continue at their current rate.

The outsiders. The move to oust Kane, 63, from the top slot at A&P he has held since 1971 was precipitated by changes that took place last year at the Hartford Foundation. There, where the pattern has always been to name trustees who were former executives of A&P, a quiet revolution in foundation policy took place that culminated last

POLICY CHANGES ON THE HARTFORD BOARD RESULTED IN THE OUSTER OF KANE

week in Kane's ouster and Scott's election. A desire by the trustees to get outside advice led to the recruitment of four additional trustees, including Dalsemer, Dr. Perry E. Gresham of Bethany College, Bethany, W. Va.; Oscar L. Dunn, senior vice-president for finance of General Electric Corp.; and Charles Moeller, Jr., senior vice-president for investments of Metropolitan Life Insurance Co. The number of trustees was expanded from 9 to 12 and as Dalsemer puts it, "The majority became a group of men with no connection with A&P."

Meanwhile, pressure was being applied to the trustees from another direction. Michael McIntosh, president of the McIntosh Foundation of West Palm Beach, Fla., filed suit in New York State Supreme Court early this year and introduced as evidence information supplied to his foundation by A&P indicating that three A&P divisions, based in Chicago, Buffalo, and Cleveland, had accumulated losses of $80-million in the four years ending in 1973. The McIntosh Foundation, which owns 1,350,000 shares of A&P common, asked for consolidated financial information on A&P, but was turned down.

"We could still appeal, but with these new developments we won't," says McIntosh, explaining that "we felt strongly that we had to use all the tools we had in our fiduciary capacity as trustees to improve our assets."

It was the matter of the fiduciary responsibility of the board of trustees that apparently precipitated the changes at the Hartford Foundation, too. Leverage was applied on the Hartford trustees by other big A&P stockholders, such as the McIntosh Foundation and Thor Ramsing, president of Trident Oil Corp., who with his wife owns 350,000 shares of A&P common.

Track record. "The record under Kane speaks for itself," says Ramsing. "We reminded the A&P board that its track record was not all that great. When you have five dividends passed and get involved in an antitrust lawsuit, you have evidence of disastrous mistakes." In the antitrust suit, a group of cattle ranchers and feedlot operators charged A&P, Safeway, and Kroger with conspiracy to set meat prices. Kroger and Safeway settled out of court for $45,000 each, but A&P chose to fight, and a district court in San Francisco held the company liable for $32-million in damages this summer.

McIntosh appears to have used the passed dividends as a wedge to raise the question of whether the trustees of the Hartford Foundation were looking after their assets properly. The Hartford trustees saw the light and this spring established a special three-man committee to work with A&P on its problems. Dalsemer was named chairman, and the other committee members were GE's Dunn and Hartford Foundation President Harry George. The trustees also retained the Davis, Polk law firm to advise them on their fiduciary responsibilities.

The upshot of Dalsemer's work was the retention of the management consulting firm of Booz, Allen & Hamilton to study A&P's reorganization. Scott acknowledges that Booz Allen approached him with several "feelers" for the top A&P slot.

The former chief executive of Albertson's says he expects to "replace a lot of physical plant" at A&P, and he thinks the big food retailer "may even grow smaller for a while." Scott says that he would like to see A&P regain its position as the biggest food retailer, lost to Safeway last year, but stresses "this is not my No. 1 goal for a while." The "biggest challenge and opportunity in the industry," as he terms his job, is "getting A&P turned around and growing again."

EXCERPTS FROM TRANSCRIPT OF SEC PROCEEDINGS.

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* * *

Judge Ullman: * * * Does anyone else wish to make an opening statement? Mr. Murtaugh?

Mr. Murtaugh: Lewis Murtaugh. I would like to say on the record that the possibility of conducting consecutive hearings is very nil. And I would want to do justice to my position, the position of du Pont shareholders generally, and I wouldn't want my participation here to be in any way considered to be a waiver of my right to ask for a continuance at this time if consecutive hearings are to be the order of the day. However, I don't anticipate Your Honor's ruling to that effect. We could just continue my motion for a continuance until we see how the hearing comes out.

Judge Ullman: Your participation will not be a waiver of your request.

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* * *

Judge Ullman: I think as Mr. Gribbon suggested, if and when the time comes for a determination with respect to the need for continuing the hearing——

Mr. Murtaugh: That is not what I was directing myself to.

Judge Ullman: I understand that, sir. But I think that related to that question will be certain questions which you have raised in your motion.

Mr. Murtaugh: Thank you very much, sir.

Mr. Anderson: Your Honor, the Division does not have an opening statement. However, we would like to note that as you mentioned, the Commission issued an order—excuse me, a notice of filing on October 3. In response to that notice of filing the Division received letters from 19 different people, sometimes as many as ten different letters.

I have given the applicants the originals of those letters, in some cases copies, because that is what was received by the Division. And the Division would like to see these put into the record not for the truth of the matter therein asserted but for the fact that the Division did receive them——

• • •

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Mr. Gribbon: Your Honor, with Mr. Broderick's approval I will conduct the principal examination of Mr. Townsend on behalf of both of the applicants, although I believe he would like to reserve the opportunity perhaps to supplement what I say. We will try not to duplicate.

Judge Ullman: Very well, sir.

DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Would you please state your name?

A. Charles C. Townsend, Jr.

Q. And what is your occupation?

A. My occupation is investment banker. I am a partner of Morgan Stanley & Co., and a managing director of Morgan Stanley & Co., Inc., an affiliated corporation.

Q. What is your particular position with Morgan Stanley?

A. My position at the moment is partner in charge of the corporate financing department at Morgan Stanley. This department has some 70-odd employees of whom 12 are partners, and the business of the department is to prepare materials for public issues of securities, prepare material for providing corporate merger advice, and technical operations of that type.

Q. What is your educational background, sir?

A. I was graduated as a bachelor of science in electrical engineering from Princeton University in 1951, and I was graduated from the Harvard Graduate School of Business

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Administration in 1956.

Q. How long have you been associated with Morgan Stanley?

A. Since early 1959.

Q. How large is Morgan Stanley & Co.?

A. At the moment Morgan Stanley & Co. and its affiliated organizations employ approximately 400 people. These operations range from the investment banking company, Morgan Stanley, to a real estate brokerage operation, Brooks, Harvey & Co., and an affiliated investment banking company, Morgan & Cie International, S. A., which is located in Paris.

Q. Will you describe briefly your experience with Morgan Stanley since you went with the firm in 1959?

A. Yes, sir. Working backward, I have been the head of the corporate finance department at Morgan Stanley since early—no, excuse me, late 1971. Prior to that time and from early 1969 I was a vice chairman and planning director of Morgan & Cie International in Paris, the international investment banking affiliate which I described a moment ago. Prior to that time I was—and from the date

I was employed at Morgan Stanley in early 1959 I worked in the corporate finance department and became a partner in the firm working in that department in 1963. My activities largely in the early years working at Morgan Stanley involved work for the du Pont Company and Christiana Securities

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Company, stemming from work in the divestiture proceeding wherein Sumner Emerson testified in Chicago in 1961.

Q. What do you mean by the divestiture proceeding?

A. This was the anti-trust case of the United States versus du Pont-General Motors.

Q. All right.

A. And my activities at that time were to help Mr. Emerson prepare his testimony for the court proceeding in Chicago, and following that, preparing his testimony before the House Ways and Means Committee and the Senate Finance Committee.

In addition to that, we helped advise du Pont in the disposal of the General Motors shares and assisted Christiana in their disposal of General Motors. Morgan Stanley & Co. performed the role of managing underwriter in the four secondary offerings of General Motors which accompanied the divestiture of General Motors.

Q. Did you advise Christiana in any other matters during this period?

A. Yes, sir.

Q. What were they?

A. During the divestiture proceeding Christiana received three large blocks of General Motors stock and Morgan Stanley advised Christiana; for tax purposes Morgan

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Stanley evaluated those blocks of stock.

Q. Did you advise Christiana with respect to any exchange offerings?

A. Yes, sir, we did. In 1965, early 1965 Christiana offered 8,400,000 shares of General Motors exchanged out to its own shareholders. And of these, 4.4 million were exchanged. Morgan Stanley advised Christiana on what basis of exchange Christiana should offer these shares.

Q. Were there any other exchange offers in which Morgan Stanley offered advice?

A. Yes, sir. In 1967, I believe, Christiana exchanged out 600,000 shares of common stock of Hercules, Inc., again to Christiana's common shareholders and we advised Christiana on what basis of exchange to offer them to the shareholders.

Q. Were you personally involved, Mr. Townsend, in these two exchange offerings that you described?

A. Yes, sir, I was.

Q. Would you tell us briefly the manner in which Morgan Stanley analyzes problems such as exchange offerings that are presented to them with a request for financial advice? Your procedure?

A. Yes.

Morgan Stanley normally—when a project comes into Morgan Stanley such as the projects Mr. Gribbon has described, a team will be put together of people in the

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corporate finance department and marketing departments. This would be a relatively small team of four to six people. The responsibility of this team would be to gather information and to present it in a manner in a memorandum and exhibits that would then be distributed to a larger group

within the firm. I might say that in this case, Mr. Gribbon, the group to whom such a memorandum was distributed amounted to about 18 to 20 people. And these people are senior partners of the firm and experienced associates who have had experience in matters such as this.

The group after they have had a chance to study the information meets maybe several times and discusses the problem and reaches what we consider to be a firm view as to what the answer to the question should be. That procedure was followed in this case.

Q. You have described a number of instances in which the firm has rendered financial service to du Pont and Christiana. Are there any other instances in your recollection where the firm has served either du Pont or Christiana in financial matters?

A. From time to time, sir, the firm has evaluated the market value of blocks of Christiana and du Pont stock for shareholders of those two companies. It has also arranged the private placement of some blocks of these stocks. Fairly recently Morgan & Cie International managed a public

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issue for the du Pont Company in the international market.

Q. Do any of the partners of Morgan Stanley serve on the board of directors of either du Pont or Christiana?

A. No, sir.

Q. Have you ascertained the stockholdings of the Morgan Stanley partners in du Pont and in Christiana?

A. The officers of Morgan Stanley & Co., Inc., which is the group of people we asked to find out what their shareholdings are—the officers of Morgan Stanley & Co., Inc. own I believe 1,189 shares of common stock of the du Pont Company, and they also own 80 shares of the common stock of Christiana Securities Company.

Q. Those figures you have given us are the combined holdings of all of the——

A. Yes, sir, of all the managing directors and vice presidents.

Q. Now, was Morgan Stanley asked to advise as to the terms upon which a merger of du Pont and Christiana might be effected?

A. Yes, sir, it was.

Q. By whom was such a request made?

A. The request was made by the negotiating committees of both companies, sir.

Q. Was the request made in writing?

A. Yes, sir. As I recall, it was made in the form

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of a letter dated June 6, 1972.

Mr. Gribbon: At this time, Your Honor, I ask that there be marked for identification as Applicants' Joint Exhibit No. 3 a communication dated June 6, 1972 from the special committees of the board of directors of du Pont and Christiana to Morgan Stanley & Co., 140 Broadway.

Judge Ullman: Off the record.

(Discussion off the record.)

Judge Ullman: On the record.

Mr. Gribbon: In the pre-hearing submissions made by the parties the documents to be offered in evidence by each party were identified, and du Pont and Christiana, the applicants, identified these documents by number. And this one is in the hands of the parties and already contains the legend on it "Applicants' Joint Exhibit No. 3," and I thought to avoid

confusion it might be well just to stay with that as we go through here.

Judge Ullman: Very well, sir.

(Applicants' Joint Exhibit 3 was marked for identification.)

By Mr. Gribbon:

Q. Would you examine the document that has been marked Applicants' Joint Exhibit No. 3, Mr. Townsend.

A. Yes, sir.

Q. Do you recognize it?

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A. Yes, sir.

Q. What is it?

A. This is the letter from the special committee of the boards of directors of the two companies asking Morgan Stanley to advise the committees with regard to the proposed transaction.

Q. What did you understand to be the nature of the assignment that Morgan Stanley was being asked to take on?

A. The assignment we understood that was to be taken on was to propose to both committees the terms of a merger that would be reasonable and fair and not overreaching.

Q. Were you advised as to why both applicants or both companies came to you jointly for advice?

A. Not specifically, Mr. Gribbon. We were not surprised that the companies had come to us and asked us for their advice.

Q. What do you mean by that?

A. Well, we had experience—if I may say so, we had had experience in the past when the Delaware Realty and

Investment Company was merged into Christiana, and at that time we were advised by both those companies to propose the terms of merger that were reasonable and fair and not overreaching.

Q. Did you understand at the time you undertook this engagement that the transaction would have to be subjected

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to the approval of a governmental agency?

A. Yes, sir, we were aware that the Securities and Exchange Commission would have to review the proposed transaction under the Investment Company Act of 1940 and itself determine that the terms were reasonable and fair and not overreaching.

Q. Had Morgan Stanley previous experience in advising in regard to Section 17 transactions?

A. Yes, sir, in the transaction I just mentioned, the Delaware Realty-Christiana transaction, this transaction was also reviewed by the Securities and Exchange Commission and judged to be reasonable and fair and not overreaching.

Q. Morgan Stanley has advised in other Section 17 transactions to your knowledge?

A. I do not recall them specifically except that I am fairly certain that in both exchange offers wherein Christiana offered General Motors stock and Hercules, Inc. common stock to its own shareholders, these two transactions had to be approved by the Commission.

Q. Did you in developing your analysis in response to this engagement obtain legal advice as to the interpretation that had been placed upon Section 17?

A. Yes, sir, we did. And we also asked counsel to research the record to determine what precedents, if any,

existed that would provide evidence as to how the transaction

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might be structured.

Q. And did counsel assist you in the respect you have described?

A. Our counsel, Davis Polk and Wardwell, together with another legal firm we engaged, Skadden, Arps, Slate, Meagher and Flom, gave us information in this regard, yes, sir.

Q. Were you advised, Mr. Townsend, that other investment firms had been retained to render financial advice with respect to the proposed merger?

A. Yes, sir.

Q. Did you consult with such other firms in the development of your analysis and opinion?

A. No, sir.

Q. Were you asked as part of your engagement to advise du Pont or Christiana as to whether a merger should be undertaken?

A. No, sir. When we were informed that the companies wished to have us propose the terms of merger it is my recollection they had both agreed to study the matter and we were not advised as to whether or not they should merge.

Q. What did you understand to be the advantages and disadvantages of a merger into Christiana?

A. Well, the first, most significant one was the possibility that if a merger was arranged at something near

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net asset value the stockholders of Christiana would have a substantial increase in the market value of their holdings.

The second was an increased liquidity in the market for their securities. First of all, Christiana has a reasonable over-the-counter market. The market for du Pont is substantially more liquid. And Christiana stockholders receiving du Pont stock would have a much more liquid market in which to market their shares.

The third advantage to Christiana in the merger with du Pont would be the elimination of the Federal income taxes and expenses of operation that have been associated with Christiana's operations throughout the past.

As far as the disadvantage is concerned, the principal disadvantage Christiana would face would be whatever benefit might result from its being the largest shareholder in du Pont, owning some 28 percent of the shares.

Q. What did you understand to be the advantages and disadvantages of a merger to du Pont?

A. To du Pont? The principal advantage to du Pont would be the dispersal of this large block of common stock. It would enhance—we believe it would enhance the relative voting rights of du Pont's other common stockholders.

Secondly, if the merger terms were arranged in such a manner that du Pont could acquire Christiana at something less than its net asset value, there would be a

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financial advantage to du Pont.

Thirdly, du Pont in its normal corporate operations, because of its relationship with Christiana, in many cases had to seek exemption under the 1940 Act for commercial transactions. And by merging Christiana out of existence this requirement would also disappear.

A fourth, there might have been in our view a modest increase in the liquidity for du Pont common stock on the exchange by virtue of folding in the volume in Christiana.

Q. You spoke of dispersion of the largest single block as being an advantage in the sense that it would increase the vote of other du Pont shareholders?

A. That is correct, sir.

Q. Did you see any other advantages to du Pont in the dispersion of this large and single block?

A. Well, one could conceive in the future if du Pont had to raise equity capital—the manner in which it would raise equity capital I think is required to be by offering shares to its stockholders. One could see and one could estimate that if Christiana as the 28 percent holder of du Pont had to exercise these rights, it would be difficult, if not impossible, for it. And thus if those rights were thrown on the market it might make a very—it might inhibit, if you will, du Pont's ability to raise common

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stock funds.

Q. Did the existence of this large single block in one voter impose any threat to the market value of the balance of the du Pont shares?

A. No, sir. One cannot say that when the Christiana stockholders receive du Pont following a merger that sales would not result. I think sales would result but we felt that they would be of a nature that would not have a material and lasting effect on the market price for du Pont.

Q. Did Morgan Stanley ultimately render to the representatives of du Pont and Christiana an opinion as to the terms on which merger might be undertaken?

A. Yes, sir. We prepared a letter dated July 7th—a memorandum dated July 7th, together with some exhibits, and a single-page letter in which we commented on the merger exchange ratio as had then been negotiated.

Mr. Gribbon: May I ask, if Your Honor please, that there be marked for identification as Applicants' Joint Exhibit 1-A a 16-page letter from Morgan Stanley & Co. dated July 7, 1972, to Messrs. McCoy and Shapiro, directors of the du Pont Company, and Messrs. Edward du Pont and Felix du Pont, directors of Christiana.

And in conjunction with this I would like to have marked as Applicants' Joint Exhibit 1-B a set of 14 exhibits that accompanied that opinion that are found to carry the

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date June 30, 1972. And as Applicants' Joint Exhibit 1-C, a one-page letter from Morgan Stanley dated July 7, 1972, again to Messrs. McCoy and Shapiro and Messrs. Edward du Pont and A. Felix du Pont.

Judge Ullman: Yes.

(Applicants' Joint Exhibits 1-A through 1-C were marked for identification.)

Mr. Gribbon: I might explain, Your Honor, that these three exhibits that I have asked to be identified as Joint Exhibits 1-A, B and C, are part of the application—physically part of the application which had been identified in our prehearing submission as Joint Applicants' Exhibit 1. In view of Your Honor's ruling with respect to that application, it seemed to me desirable to have these documents, and there will be some others from the application introduced in evidence.

Judge Ullman: Very well.

By Mr. Gribbon:

Q. Will you examine Applicants' Exhibits 1-A, B and C, Mr. Townsend?

Mr. Gribbon: If Your Honor wants to look at those I think Mr. Townsend has an extra set of these three documents.

Judge Ullman: Yes, sir. He is using his extra set, sir.

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By Mr. Gribbon:

Q. Did you participate, Mr. Townsend, in the preparation of these three documents?

A. Yes, sir. I was in charge of the team that prepared the information for the firm to consider, and ultimately composed this opinion letter addressed to the two companies.

Q. Would you explain for the record just what these three documents are?

A. Well, the first document, 1-A, is a letter in which we set forth the considerations that the—the points that were considered in our firm which arrives at the view, the conclusion, the recommendation as to a range for the possible merger of Christiana into du Pont. The Exhibit 1-B is a compilation of exhibits with information—14 exhibits, information about the du Pont Company, memoranda of fact of du Pont and Christiana, financial statements of du Pont and Christiana which had been prepared in our office from information furnished to us by the companies, information relative to the common stock prices of du Pont and Christiana, analysis of the market volume and price for both companies on specified dates, the net asset value and discounted market price of Christiana securities. The effects upon du Pont common stock of various discount values. The effects upon Christiana common stock of various discount values. An

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exhibit showing the market price of du Pont $4.50 preferred stock. Another exhibit showing the market prices of Christiana's 7 percent preferred stock. And the final exhibit, a market price study of Wilmington Trust Company common stock.

Q. Were all of these exhibits that you have identified considered by Morgan Stanley in arriving at its opinion?

A. Yes, sir.

Q. All right. What is Exhibit 1-C?

A. Exhibit 1-C is a one-page letter which comments—gives our comments on the exchange ratio which we then understood had been negotiated by the two negotiating committees. And that resulted in the proposed merger at 2½ percent discount from Christiana's net asset value.

In this letter we say we believe the discount arrived at by the negotiating committees is reasonable and fair and not overreaching.

Q. You had been informed of the terms arrived at by the negotiating committee by the time Exhibit 1-C was written?

A. That is correct, sir.

Q. Now, would you tell us in brief focus the procedure that was followed by your firm from the time of your engagement up to the rendering of the opinions you have identified?

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A. Well, as I said, sir, we organized a committee, a group of which I was the leader, to prepare factual information that was then distributed to others within the office, some dozen and a half to 20 people, senior partners and experienced staff. This group arrived at a view as to the range of possible exchange ratios which was contained

in a draft memorandum submitted to the negotiating committees and their counsel under the date of June 27. On June 30 our group from the office, including the senior partner of the firm and myself and others, traveled to Wilmington to meet with the negotiating committees and their counsel and the other investment banking firms, First Boston Corporation and Kidder, Peabody & Co.

Q. Is that your first meeting with the other investment banking companies involved?

A. On this particular matter, yes, sir. And it was at that meeting that the three firms proposed their three independent views as to what the range of proposed exchange ratios should be.

Q. What was your personal participation in that meeting of the negotiating group?

A. It was my responsibility to present our recommendation, if you will, to the negotiating committees and their counsel, and I did so.

Q. Do the views set forth in Exhibits 1-A, B and C

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represent merely your personal views?

A. No, sir. As I have said, the process we follow leads us to produce for a client the firm's view, the view of Morgan Stanley & Co.

Q. And the process you described earlier for routine matters was followed in this case?

A. Yes, sir.

Q. Would you refer, Mr. Townsend, to page 4 of Applicants' Joint Exhibit 1-A, your opinion of July 7, 1972, particularly to the bottom of that page where the statement is made "Since Christiana is an investment company the assets of which consist almost entirely of marketable securities, we believe it is appropriate to consider its value

in terms of the market value of its underlying investments which is the normal way of valuing investment common stock." Do you see that statement?

A. Yes, sir.

Q. What was the basis for that statement?

A. Well, we consider it is the normal way of evaluating investment companies, to take a look at the underlying market value of their securities portfolio. Part of the evidence that supports this conclusion is the procedures that appear to have been followed in other investment company mergers, and particularly in merger cases that we have studied to develop a view as to how to make our

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recommendations to Christiana and du Pont.

Q. At page 9 of Exhibit 1-A, in the paragraph numbered 1 at the top of the page there, would you read that, please?

A. The opening "We have studied?"

Q. No, "Generally."

A. "Generally the market values of the investment companies where a market value existed were at a discount from the underlying net asset values prior to the merger negotiations."

Q. Had you conducted any studies to support that proposition?

A. Yes, sir, we had. We conducted a study—we conducted studies of a number of investment company mergers with their operating affiliates.

Mr. Gribbon: I should like here to ask that there be identified as Joint Exhibit 5 a 21-page compilation entitled "Summary of Terms of Comparable Mergers, Morgan Stanley & Co."

(Applicants' Joint Exhibit 5 was marked for identification.)

By Mr. Gribbon:

Q. Was Joint Exhibit 5 prepared under your supervision and direction?

A. Yes, sir, it was.

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Q. Let me ask you, was this exhibit prepared in—in its present form prepared prior to the submission of your opinion of July 7?

A. No, sir, it was not. It has been prepared in this form within the last month or so.

Q. What does Joint Exhibit 5 purport to show?

A. It analyzes 10 mergers of investment companies with their affiliates, their operating affiliates. Six of these mergers were subject to review by the Securities and Exchange Commission, five of those in a proceeding like this proceeding. Four—I don't mean to imply a hearing, but under the same part of the Act. Four were not subject to the Investment Company Act of 1940.

Now, if I may——

Q. Would you identify the six that were subject——

A. To the Commission's review?

Q. Yes. And point out where reference to them will be found in Exhibit 5.

A. Right.

On pages 1 and 2 is the information relative to the merger of Detroit and Cleveland Navigation Company into Denver-Chicago Trucking Company, Inc. At the time the merger took place Detroit and Cleveland had been selling, although in a limited market, at about a 16.9 percent discount from the net asset value. It was merged into

[33]

Denver-Chicago nevertheless on the net asset value basis.

Q. And does Exhibit 5 in the body of the exhibit set forth the relevant factors with respect to that merger?

A. Yes, sir. On pages 1 and 2.

Q. What is the next one?

A. The next one, pages 3 and 4 contains information about the merger of Delaware Realty into Christiana Securities Company. Prior to the merger Delaware had no market. The merger was accomplished on a basis that provided Delaware shareholders with assets less 1½ percent from their net asset value.

Pages 5 and 6 contain information relative to the Prudential Investment Company into the Axe Houghton Fund. This is one in which the Commission reviewed the fee paid to an advisor. Prior to the time of the merger Prudential had been selling at a 17.6 percent discount from its net asset value; nevertheless, it was merged into Axe Houghton on a net asset basis less the advisor's 2 percent fee.

On pages 7 and 8 is information relating to Huyler's merger into the Altamil Corporation. There was no market in Huyler's, but the two companies were merged on a net asset basis.

On pages 9 and 10 are data relating to the merger of Eastern States Corporation into the St. Regis Paper Company.

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Eastern States had been selling in the market at a 2½ percent discount from net asset value; nevertheless, it was merged into St. Regis at net asset value.

On pages 11 and 12 Harbor Plywood Corporation was merged—information relating to Harbor Plywood into Hunt Foods and Industries. And while Harbor Plywood had been selling at a 13½ percent discount in the market Harbor was merged into Hunt on a net asset value basis after an adjustment to Harbor's net asset adjustment, an upward adjustment.

Q. Does that complete the list of transactions that you found?

A. Subject to the '40 Act, yes, sir.

Q. And were there other transactions that you studied?

A. Yes, sir. The merger of the United States Foil Company into Reynolds Metals Company, in which there was a substantial discount in the market for United States Foil stock but nevertheless United States Foil was merged into Reynolds at net asset value. That information relative to that merger is on pages 13 through 15.

On pages 16 and 17 of this exhibit is information relating to the merger of Beneficial Corporation into the Beneficial Finance Company. And while Beneficial Corporation was trading at a 17.3 percent discount from its net asset value, it was merged into Beneficial Finance at a premium

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of .6 percent over net asset value.

On pages 18 and 19 are data relating to the merger of United Utilities Company into the American Water Works Company, Inc. There was no market for United Utilities stock; the merger was accomplished on a net asset value basis.

The last part of this exhibit, pages 20 and 21, relates to the merger of Eccles Investment Company into the Utah Construction and Mining Company. Again there was no market for the holding company common stock, but it was merged into Utah Construction at a discount of 1.83 percent from its net asset value.

Q. Now, Mr. Townsend, did Morgan Stanley study each of these 10 transactions prior to the rendition of its opinion to the board of directors?

A. Yes, sir, we did.

Q. What conclusions do you draw from this study as they may be relevant to the terms of the merger under consideration?

A. One conclusion one draws is that net asset value is a basis for considering the value of an investment company as it is merged into its operating affiliate. One can also conclude that in many of the cases the investment company was merged into its operating affiliate with no discount whatsoever, and in one case a premium, slight premium. In two of the cases there was a discount from net asset value, the one of 1½ percent in Delaware Realty and the one of 1.83

[36]

percent in the Eccles Investment Company.

Q. What was the maximum discount that you found in your examination of these?

A. The latter figure.

Q. 1.8?

A. Yes, sir.

Q. Was your examination of these 10 transactions a significant part of the support for the statement that appears at page 9 of your opinion, Exhibit 1-A?

A. Yes, sir.

Mr. Murtaugh: The letter of July 17th?

Mr. Gribbon: 7th.

The exhibit was prepared after this.

Mr. Murtaugh: Can I get the last question and answer, please?

Judge Ullman: Would you read the question and answer, please.

(The question was read back.)

The Witness: Yes, sir.

By Mr. Gribbon:

Q. I want to make clear, I think you testified earlier, Mr. Townsend, that Exhibit No. 5 in its present form was prepared after your opinion?

A. Yes, sir.

Q. It was prepared in preparation for this hearing,

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was it not?

A. Yes, sir.

Q. Did you, however, study the transactions that are set forth in Exhibit 5 prior to the rendition of your opinion?

A. Yes, sir.

Q. And in connection with your analysis of the proper terms of the du Pont-Christiana merger?

A. Yes, sir, we did.

Q. Now, is it your testimony that in evaluating investment companies for merger purposes, it is inappropriate to make any adjustments to net asset value?

A. May I have that question again?

(The question was read back.)

The Witness: No, in some cases it is appropriate, sir. Some of the examples had adjustments, and as I think is set forth in our opinion letter dated July 7 we have suggested that certain adjustment be made to Christiana's net asset value.

By Mr. Gribbon:

Q. Let me ask you to refer to pages 12 and 13 of your opinion of July 7, Exhibit 1-A, and indicate where appropriate as each of the assets of Christiana is listed there whether or not an adjustment was made and why it was made.

A. Yes, sir.

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Q. Do you have that exhibit and the tabulation?

A. I have pages 12 and 13 in front of me, yes, sir.

Q. What does that tabulation purport to show, first?

A. That tabulation purports to show our estimated adjusted net asset value of Christiana and Christiana common stock.

Q. All right. Will you take each of the assets that are listed there and explain whether there was an adjustment, and if so, what it was?

A. Yes, sir.

The du Pont common stock is listed for those who have it in front of them—du Pont common stock and preferred stock was listed at their then market values. I say then market values. The market prices were taken as of May 31. The Wilmington Trust common stock was added in at its market price of May 31 less an adjustment for the estimated expenses of selling that block and the capital gains taxes associated therewith because we had been informed by du Pont Company that they did not wish to hold the Wilmington Trust common stock, so that you might say that we made that adjustment in view of what du Pont planned to do with that asset.

Q. That adjustment was twofold: for taxes and for expenses of sale?

A. Expenses of sale, that is correct.

As far as the News-Journal Company is concerned,

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we were instructed by both companies that they were going to retain an expert to appraise the value of that company which had no public market for its stock. The gross value shown in the tabulation of 24,250,000 is the value he came up with. However, we have deducted in

making our adjustments to Christiana's net asset value the estimated capital gains taxes that would be associated with that sale, because again du Pont told us they did not wish to hold onto that asset.

Now, in the cash and equivalent account shown here on this page of 4,238,875, an adjustment had been made to remove $1 million from Christiana's cash and equivalent because we had been informed that insofar as Christiana's tax claim was concerned it would be impossible to value that as part of Christiana's net assets at this time and that the Christiana's board would be organized to pursue this claim in the future following the merger and that a million dollars would be taken out of Christiana's cash account to support this litigation.

The final adjustment that we made we were instructed by the companies that they estimated the expenses of the proposed merger were one and a half million dollars, and we removed that entirely from Christiana's net assets. All of the foregoing results in an aggregate net asset value for Christiana of 2,307,000,000, and we then removed Christiana's 7 percent preferred stock at $120 a share—

[40]

Q. What was the basis for your treatment of the Christiana 7 percent preferred stock?

A. The company asked us and we recommended to them that in view of the preferred stock's liquidating value of $100 a share, its redemption price of $120 a share, and that in a merger these shareholders—the holders of this stock would have appraisal rights, there was likelihood that a court would award them $120 a share. We recommended that du Pont offer the Christiana shareholders $120, the market value of du Pont common stock in exchange for their stock.

As I was saying, if you remove the aggregate for that, or 12,780,000, the adjusted net asset value available to holders of Christiana common stock comes out at $2,294,760,000. These are the adjustments, sir, that we made.

Q. Are they explained in the notes to this table?

A. Yes, sir, I believe they are.

Q. Let me just make sure. You mentioned a tax claim of Christiana. Where does that figure enter into your final net asset value figure? Any value given to that?

A. No value is given to that. Christiana's books of account show I believe some $11 million for that asset, so-called. We did not include that in Christiana's assets as we tabulated them on pages 12 and 13.

Q. What provision was made for any ultimate recovery in that case?

[41]

A. Well, I think I explained that the companies— the participants agreed that in view of the fact it was impossible to determine value at this point, that a special committee be set up to pursue the tax claim following the merger and that once the tax claim—the litigation had been completed and a decision made, du Pont's stock equivalent to the proceeds less any of the $1 million remaining would be distributed to the Christiana stockholders.

Q. Were you, Mr. Townsend, aware during the entire time you were studying this matter that a tax-free merger was being contemplated whereby du Pont would give shares of its stock in return for the assets it received from Christiana?

A. Were we aware, sir?

Q. Yes.

A. That a tax-free merger was being contemplated here?

Q. Right.

A. Yes, sir.

Q. If the transaction that you were studying contemplated that du Pont purchase the assets of Christiana with cash, would you have recommended a net asset value transaction as computed at page 12 here?

A. No, sir, we would not. That was a different transaction, and we did not consider that type of a transaction.

Q. At no time in your work were you asked to consider

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the cash value let us say of the Christiana assets?

A. No, sir.

Q. Now, you have testified that two of the advantages to Christiana of the proposed merger were a significant appreciation in the market value of the holdings of Christiana shareholders and an elimination of the corporate —inter-corporate dividend tax that Christiana was paying on dividends from du Pont. Do you recall that testimony?

A. Yes, sir.

Q. Now, to what extent in your opinion would it have been fair and reasonable for the non-Christiana shareholders of du Pont to participate in those benefits flowing to the Christiana shareholders?

A. Well, in this transaction, which in essence is a transfer of du Pont stock for du Pont stock, and looking at the precedents, it doesn't seem that it would have been fair at all for du Pont to have participated in this increase in market value or reduction in taxes. And in fact, it might have been unfair and overreaching.

Q. Is it your opinion—it is your opinion as expressed here that the merger terms were fair and reasonable to du Pont?

A. Yes, sir, that is our opinion.

Q. What is the basis for that opinion?

A. Well, as I say, in a—if Christiana had existed

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as nothing but a block of du Pont stock, and in effect 98 percent of Christiana was du Pont stock, the shareholders of du Pont other than Christiana in a share-for-share exchange were being treated fairly, and as I say, in our view had no basis for believing they should participate in the benefits to Christiana of an increase in market value and a reduction of income taxes.

Q. In your opinion were the non-Christiana shareholders of du Pont receiving fair value for the shares of du Pont that were being issued to the Christiana shareholders?

A. Yes, sir. As I say, if the transaction had been nothing but a switching of du Pont for du Pont, they would have received fair value. And I think I should add that as to the other 2 percent of the assets, we felt we had made a sufficient adjustment to protect the du Pont stockholders in the exchange of du Pont stock for those assets.

Q. Page 15 of your report, Joint Exhibit 1-A, the opinion is expressed that an exchange ratio which recognizes a discount from Christiana net asset value is appropriate. Now what is the basis for that opinion?

A. Well, sir, we felt that the advantages to Christiana are clear, they are quantifiable, they are very clear. The advantages to du Pont are—while they are considerable, are not so clear. And it was our view and our recommendation to Christiana that they in accepting a

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discount from their net asset value offer a financial inducement to the shareholders of du Pont to approve the transaction.

Q. Did you see any disadvantages to du Pont in the proposed transaction?

A. As I said before, there could have been some selling of du Pont common stock received in the merger, but we thought that that disadvantage, or that market impact, if you will, would be brief and modest in its nature.

Q. All right. Still referring to page 15, I point to the figures you ultimately come to there in which you recommend a discount in the range of .5 percent to 2.5 percent as being reasonable and fair to both companies and not representing overreaching by either party. What was the basis at which you arrived at that range of discount figures?

A. Let me say here that these numbers, while they look very exact, are the results of informed judgment of the group of people in the office who studied the matter. There is no way to take a calculating machine or a slide rule and come up with those numbers, and it would be unfair for me to represent that that is how we did it. However, taking a look at those numbers, a half percent is equivalent to about $10 million, and 2½ percent is equivalent to about $55 million, and we felt numbers of that size would indicate

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Christiana's desire to induce the du Pont stockholders to follow through with the transaction.

Q. Did you have any particular precedents in mind in arriving at this range of discounts?

A. Well, certainly we had—the one I think we felt was most relevant was the Delaware Realty into Christiana.

And that as you recall was done at a 1½ percent discount. The range we have shown here or recommended here gives a measure of flexibility on either side of that 1½ percent.

I think, furthermore, we had in mind the transactions wherein Christiana exchanged out General Motors stock and Hercules stock for its own common stock wherein the transaction was done at net asset value—full net asset value. And we felt that this also gave us some substantiation for the range we have here.

Q. Were you aware of any transaction comparable in nature where there was a discount of as much as 2.5 percent from net asset value?

A. No, sir, we were not. As I think I mentioned before, the one that we were aware of at a large discount was the 1.83 percent discount in the case of Eccles Investment merger into Utah Construction.

Q. Why did you feel warranted in recommending that these companies adopt at the upper end of your range a discount higher than any you had found in any comparable

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transactions?

A. Well, again, as I say, the advantages to the holders of Christiana were very substantial and easily seen. And it was our judgment that a number at the higher end of the range was possible—it was possible that a number at the higher end of the range would be necessary to induce the du Pont stockholders to vote in favor of the transaction. That 2½ percent discount, as I mentioned, is equivalent to about $55 million in market value, from net asset value of Christiana.

Q. From the viewpoint of Christiana and its shareholders, what was the basis of your recommendation that a discount greater than 2.5 not be accepted?

A. Well, again, as you have noted, 2½ percent is the largest—if the transaction goes through will be the largest such discount apparently on the record. We felt that anything larger than that would be very difficult for us to recommend to Christiana in view of the precedents, the record, in view of the fact that Christiana stockholders we believe think that they hold the equivalent underlying number of du Pont shares and would not be agreeable to losing a significant part of that underlying investment. These are the reasons, sir, we felt that 2½ percent was probably the maximum—was the maximum limit that Christiana should accept.

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We had also to take into account the fact that Christiana did not have to go through with this transaction and that at some point the cost would be too great.

Q. What do you mean Christiana didn't have to go through with it?

A. There was no requirement that Christiana be merged into du Pont. This was a—while they had initiated the transaction as I understand it, their negotiating committee had to be assured that the price—or the cost to them of entering the merger negotiations was not excessive.

Judge Ullman: You mean there was no court order or Commission order or anti-trust aspect.

The Witness: That is correct, sir.

By Mr. Gribbon:

Q. Was it your opinion that a discount in excess of 2.5 percent should be unacceptable to the Christiana shareholders despite the benefits they were getting?

A. I think that is what our opinion means, yes, sir. Our letter dated July 7.

Q. What did you have in mind as ways by which the Christiana shareholders might ultimately obtain the du Pont shares that they owned indirectly?

A. Well, another possible method for Christiana shareholders to obtain their du Pont stock could have been through a liquidation of Christiana. Now, I think we should

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note that of the Christiana shareholder—Christiana shares outstanding, approximately one-eighth of them are held by people who would have no cost in taxes in such a liquidation.

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Q. Why is that?

A. Because they are tax exempt institutions and would incur no tax in a liquidation of Christiana and the distribution to them of their du Pont shares.

We actually were considering, and up until a very late date in the procedure here, a special form of liquidation, namely liquidation under Section 333 of the Internal Revenue Code. We understood that it might have been possible for Christiana to liquidate under that on a very advantageous basis and at relatively modest tax expense.

Counsel had advised us throughout the procedure that they were studying this, and at the time—I should say I guess at the time of our meeting with the negotiating committees in Wilmington on June 30th the estimate I believe at that time was that the possible aggregate tax costs of a Section 333 liquidation would range between 40 million on the low side in taxes to the Christiana shareholders to 70 million on the high side.

Now, the 70 million on the high side is equivalent to about 2.8 percent of Christiana's net asset value, and it

was this number that we at that point used as somewhat of a benchmark. We figured that Christiana's officers and counsel would attempt, if they had to follow a Section 333 liquidation, to obtain a lower tax cost than the maximum then estimated, and at that time it was our—we figured that Christiana

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probably should set 2 percent as a merger discount as the upper limit which they should be agreeable to accept. And that is what we recommended at the June 30th meeting.

Q. And you subsequently changed the upper range of your recommended discount to 2.5 percent.

A. That is correct, sir.

Q. What was the basis for that change?

A. The basis for that change was that counsel informed us that after thorough study it was not feasible any longer to consider a Section 333 liquidation for complicated reasons as to the estimation of Christiana's accumulated earnings and profits.

Q. What effect did that have upon your analysis?

A. Well, with the 2.8 percent benchmark as the maximum, we figured that Christiana could under those circumstances be willing to accede to a 2½ percent discount rather than a 2 percent discount and still the transaction would be fair and reasonable.

Q. What did you understand to be the obstacle in the way of a 333 liquidation at this time?

A. Well, as I said, sir, it is in the determination of Christiana's accumulated earnings and profits, and how this had been affected by the merger into Christiana of Delaware Realty.

Q. Were you advised that a 333 liquidation was off for

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all time?

A. No, sir; that it was not feasible as of that date. Not feasible any longer for us to consider in the process we were going through.

Q. Now, you referred earlier in your testimony to a conventional liquidation, I believe.

A. Yes, sir.

Q. How does that differ from the 333 liquidation in your thinking? I don't mean the technicalities of it, but—

A. Well, that there would be a very much more material tax cost to the low basis stockholders of Christiana, making it a somewhat unlikely event—an unlikely event.

Q. But in that connection you did mention certain groups of stockholders that would be benefited by a conventional liquidation?

A. That is correct. The tax exempt shareholders who would have no tax cost in a liquidation.

Q. And any other stockholders in that position?

A. Well, an analysis of Christiana shareholders leads one to believe that there are some high basis shareholders; exactly how many shares are involved in that, we have identified perhaps three percent, but that is certainly a minimum, of the Christiana stock is high basis stock. And they would have modest cost in a liquidation of Christiana.

Q. What is the impact of the 2.5 percent discount

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that has been agreed upon with respect to your tax exempt Christiana shareholders and the high basis shareholders?

A. Well, it has removed 2½ percent of their underlying net asset value.

Q. Did you have in mind the existence of this tax exempt group and high basis shareholders of Christiana in developing your analysis?

A. Yes, sir, we did. We thought that anything higher would be unfair to these people.

Judge Ullman: There will be a recess for ten minutes.

(Short recess taken)

Judge Ullman: The hearing will please come to order.

By Mr. Gribbon:

Q. Mr. Townsend, in considering the terms to recommend to the du Pont and Christiana committees did Morgan Stanley take into account the possible impact upon the market value of du Pont shares of consummating this merger?

A. Yes, sir, we did.

Q. Let me ask you, at what point in your consideration of this matter did the possible impact of the transaction enter into your thinking?

A. I think right at the outset, sir, we were asked by the participants, or counsel for the participants, to

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consider this matter as a factor that should be weighed in coming up with a merger exchange ratio.

Q. Is there a reference to that factor in your final report?

A. I believe, sir, there is. I will have to find it. I think you will find it, sir, on page 8.

Q. And what is your assessment of that factor?

A. Well, I think we said here, and if I may quote, a possible disadvantage to du Pont of a merger would be that the broader market for du Pont shares and the elimination of the effective discount might encourage certain Christiana stockholders to dispose of their holdings, thereby

depressing the market for du Pont common stock. However, when the potential capital gains tax liabilities of large Christiana stockholders are taken into account we do not believe that there will be such disposals as would have a material and lasting impact upon du Pont's common stock price.

Q. Now, looking at the merger itself, what effect would it have upon the market value of du Pont common stock, in your opinion?

A. Well, the merger itself, if you mean the transfer to Christiana stockholders of du Pont common stock, would not in and of itself have any effect whatsoever on the du Pont market price.

Q. Now, that is notwithstanding that there would be

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some 700 or—some 7500 or 8,000 shareholders rather than one shareholder of these shares?

A. No. To have an effect on market price there would have to be some significant sales.

Q. Did you consider whether it was reasonable to expect significant sales?

A. Yes, sir, we did.

Q. What conclusions did you draw?

A. Well, in the first place one of the conditions of the merger's going through was that it be tax-free to Christiana stockholders. Thus they could receive the du Pont stock without any adverse tax consequences. Secondly, and I might say unlike the General Motors situation, there was no legal reason why Christiana common stockholders had to divest themselves of the du Pont stock.

Thirdly, and as I think I have said before, we believe Christiana stockholders view themselves as holders of du Pont, if indirectly, and so receiving the du Pont directly should represent to them a continuity of interest. And for

that reason we did not feel they would be impelled to sell du Pont common stock.

It is not like another merger where a steel company merges with a chemical company or even two chemical companies. The Christiana common stockholder would have in effect directly what he had been holding all along.

[55]

Fourthly, and as is mentioned here in our letter, we were familiar with Christiana's stockholders and the basis of the stock to them.

Q. Tax basis.

A. Tax basis. Excuse me. The cost basis. And the cost that would result to them would be substantial in any disposal of the du Pont stock they received.

I think that something on the order of 70 percent of the Christiana common stock has a very low if not a zero tax basis. And we thought that selling the du Pont stock and incurring those very substantial taxes would inhibit their coming into the market with that stock.

Q. What was the basis of your knowledge or information with respect to the tax basis of Christiana shareholders?

A. Well, a lot of the stock—we were familiar with the fact that a lot of the stock had been held for a long time and thus would have a low basis. Secondly, in the divestiture of General Motors the tax relief legislation caused the basis of Christiana and du Pont common stockholders to be reduced by the market value of the General Motors they received. So that I think there was a total of some $70 worth of GM common stock that these people received, and anyone who had a basis of 70 or less would have had a zero basis as a result of the GM distributions.

Q. Now, what was the net result of all of these factors

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in your consideration of whether the merger would lead to substantial sales by the former Christiana stockholders?

A. Well, we thought that there might be some selling. Obviously there will be some selling by small stockholders. We thought that the somewhat more liquid or greatly more liquid du Pont market would absorb these sales; that as to holders of large blocks of stock, if they chose to sell, or, for instance, if some of them died and their basis moved up and they had to pay estate taxes, these people were of such a nature, they are sophisticated people, they would do it in a manner that results in obtaining for them the largest proceeds, probably through underwritten public offerings.

Now, underwritten public offerings do have market effects. We know that. But these, if the offerings are done in a proper manner, are modest in size and not extensive in length.

Q. Were you advised, Mr. Townsend, at the time you were preparing your analysis, that there were in contemplation any substantial sales of du Pont stock by the former Christiana shareholders?

A. No, sir, we were not so advised.

Q. The opinions you have expressed here are based upon your prior experience and knowledge of the make-up of the Christiana shareholder group. Is that correct?

A. Yes, sir. The facts that I have enumerated led us

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to make, if you will, an informed judgment that there would not be a material and lasting effect on the market for du Pont.

Q. Were you aware that in conjunction with the merger there was to be provision for registration rights on behalf of certain of the former Christiana shareholders?

A. Yes, sir, we were aware of that. But that did not surprise us because in most mergers these days such provisions are part of the merger agreement.

Q. Did you in forming the judgment that was expressed at page 8 of your opinion take into account the possibility that there might be significant sales of du Pont stock by former Christiana shareholders?

A. Yes, sir. As I said a moment ago, if a shareholder of Christiana died and his basis moved up, and furthermore his estate had to pay taxes, there could very easily be possible sales in the future. These would be, as I say, probably done in an underwritten manner, and probably subject to registration under the 1933 Act.

Q. Has Morgan Stanley had any experience in the handling of sales of the character you have just described, underwritten and registration?

A. Yes, sir. I guess the best example would be last year, the year 1972, where we managed as managing underwriter very substantial stock sales in Avon Products, in Eli Lilly, S. S. Kresge, and Johnson and Johnson.

[58]

Q. Have you had prepared under your direction and supervision an exhibit of tables showing the market impact of secondaries that Morgan Stanley has managed in the last year?

A. Yes, sir. We have charts showing the market impact of those four offerings I have just mentioned, as well as the four General Motors secondaries that took place during the divestiture period.

Mr. Gribbon: I should like to have marked for identification as Applicants' Joint Exhibit No. 6, a tabulation and series of eight charts captioned "Information Relating to Certain Large Secondary Offerings, Morgan Stanley and Company."

(Applicants' Joint Exhibit No. 6 was marked for identification.)

By Mr. Gribbon:

Q. Was Exhibit 6 prepared under your direction and supervision?

A. Yes, sir, it was.

Q. Referring first to the four offerings that you mentioned by name, would you please state for us the salient aspects of each of those four offerings. Show us on this exhibit where they are set forth.

A. All right. Let me say that the method we have used to attempt to measure market impact is a rough method.

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What we have done is we have assumed that some point prior to the date that an offering of this type is announced the market will be unaffected by any knowledge of the offering. And what we have done is in a standard fashion gone back fifteen days prior to the date that a proposed offering is to be made and given that an index number of 100.

Now, the index we are talking about here is a relative index. It compares the market price of the stock in question with the Dow Jones Industrial Index so that if the Dow Jones Industrial Index moves one percent up and the stock moves one percent up, the relative index, namely the line shown on these charts, would remain at 100. If the Dow Jones Index moves up more than one percent and the stock doesn't move at all, the relative index number shown on the chart would go below 100.

If, on the other hand, the stock percentage-wise moved more than the Dow Jones, the relative index number, the number that is graphed on this chart, would go above 100.

Now, as I say, taking a point fifteen days prior to the announcement or public knowledge—demonstrated public knowledge of a deal, we have given that an index number of 100. Now, if you will turn to Chart 5, which is the Johnson and Johnson chart; this covering was of 1,585,000 shares of Johnson and Johnson, and it was offered to the public at $109.75 for an aggregate offering of $173,953,000.

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The stock marketed represented 2.8 percent of the outstanding stock of Johnson and Johnson and amounted also to 43.6 percent of the previous year's trading volume in Johnson and Johnson.

Now, if you will trace the line you will see that from the marked 15th day prior to announcement Johnson and Johnson did relatively better than the Dow Jones and the line is above the 100 line on the chart. On the date of the announcement there was a substantial market effect, and the line goes below 100. But that following the date of the announcement and thereafter, Johnson and Johnson did substantially better than the market. And I think except for the date of the announcement one can say this issue had no effect on the market. There was no market impact.

Q. Have you in a similar fashion to Chart 5 charted the market impact of the other three major secondaries that you mentioned: Kresge, Lilly and Avon Products?

A. Yes, we have, in Charts 6, 7 and 8.

Q. Could you tell us what your judgment is based upon these charts as to the market impact of each of those offerings. First, Avon Products.

A. That is Chart 8. Again there seems to have been an effect on the date of the announcement—an adverse effect on the price of Avon stock. However, several days after the date of the announcement the index moves up to 100 and

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continues at or above 100 thereafter. And we would say that there is little and very brief market effect in connection with that Avon secondary.

As far as the Kresge offering, Chart 6, there does not seem to be any apparent market effect.

Q. What was the market value of that Kresge offering?

A. It was about $266 million.

Q. What percentage of the outstanding stock of the company was that?

A. Just under 7 percent, and 44.6 percent of the previous year's trading volume.

Q. Almost half of the previous year's total trading value.

A. That's correct.

Now, Eli Lilly requires some explanation. Eli Lilly fared more poorly than the Dow Jones—or poorer than the Dow Jones following the date of announcement and did so for a period of about 3½ months. It should be noted, however, that on the 13th of April, which is in the middle of this period, an announcement was made to the public that there was some doubt about the efficacy of one of Lilly's major products. And this was in the middle of our offering period, and we can say had a very material adverse effect on the market. So that you have that other effect in here which tends to—which has tended, in our view, to keep the

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stock depressed.

Q. You recognize that there may be other effects of this same kind that you spoke of in Lilly, either good or bad, in the other market offerings?

A. Yes, sir, we would. And that is why I characterize this method of analysis as but a rough one.

Q. Now, you also have charted four offerings of General Motors stock; is that correct?

A. Yes, sir.

Q. And what market impact in your judgment is seen in those offerings?

A. Well, the first such offering, which was done at the end of July 1962, was the first offering of General Motors stock as a result of the divestiture. The market was a very weak market as those here who remember that period will recall, and a number of offerings of stock scheduled earlier in the year had to be postponed.

There was considerable doubt in our office as to whether to proceed with this General Motors issue. However, looking at the index line it seems to have been done in a manner that resulted in no adverse market effect. Because the number does not go below the 100.

Q. Is that true of the second General Motors offering?

A. No, sir. There was a substantial effect that appears in the second and third General Motors issues. So that

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in the second issue, which was done again in 1962 but in November, approximately the same size in number of shares as the first issue—and I should mention the first issue amounted to about $78 million in the aggregate, and this second issue, $87 million in the aggregate. But it took

a period of some thirteen-odd weeks for GM to come back to a point where one might say it was trading on a better basis than the Dow Jones Industrial Index.

Q. Would you refer to the last General Motors offering, Chart 4. It was the largest, was it not?

A. No, sir. The third one was the largest. The third one amounted to almost $307 million of General Motors stock. And there was a period of about 4½—I guess it is about 22 weeks when General Motors performed less well than the Dow Jones Industrial Index.

Q. Mr. Townsend, do you know whether all of the General Motors offerings you have referred to so far took place during the course of the divestiture ordered by the court?

A. Yes, sir. The first three did. I am not certain, I don't recall the last—whether the last one did too.

Q. Do you remember the cut-off date for the divestiture?

A. No, sir, I don't.

Q. What was the market experience as shown on the last of the General Motors offerings?

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A. The market experience was such that there was a modest effect actually occurring prior to the public announcement, so that news of it had been I guess leaking out. But that between the date of announcement and the date of the offering General Motors began to do better than the Dow Jones and continued to do that thereafter.

Q. Now, what conclusions based upon your experience in Morgan Stanley as set forth in these charts do you draw as to the capacity of the market to absorb substantial blocks of stock?

A. I think these charts would lead one to the conclusion, and they have led me to the conclusion that in

organized secondary offerings, underwritten secondary offerings of common stock there is frequently a market impact, an adverse market impact, but that if the offering is done well and made properly, that this market impact will disappear over a period of time following the issue.

Q. Have you formed an opinion as to the volume of du Pont stock that might be sold in secondaries of the kind you have described over a period of, say, five years, and what impact sales of the magnitude you have taken into account would have on the market in your opinion?

A. Sir, I have not formed an opinion as to how much du Pont stock would come into the market.

Q. No, I am asking you to express an opinion if you

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have one as to how much the market could absorb without regard to whether the shares are going to be sold or not.

A. If you would permit me to state it another way, if, for instance, say 10 percent of the du Pont Company were to come into the market, in today's market that would amount to around eight or nine hundred million dollars of du Pont common stock.

Q. How many shares would that be roughly?

A. 4.7 million, just under 5 million. It is our view that a marketing program could satisfactorily distribute this block of stock over a, say, three to five-year period with nothing more than periodic market effect which would occur at the time of the issues and which would be dissipated following the issue.

Q. And when you speak of periodic, what period of time do you have in mind? What are the ranges?

A. Something on the order of those ranges we have seen in these charts here. It would be difficult to tell. Maybe a month, maybe two months, maybe even three months, depending on the market conditions at the time,

the way in which the underwriting has been done. We would not want to recommend that sellers of du Pont stock overtax the market at any particular time, and the size of the issue would have to be gauged accordingly.

Q. What is your opinion as to whether there would be

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any lasting impact on the market value of the du Pont stock if a program along the lines you have assumed, that is, a sale of 10 percent of du Pont, were undertaken over five years?

A. I think what I have said, sir, is that there would not be a lasting impact. There would be an impact which would coincide with the times of the specific secondary issues.

Q. Now, before we leave this subject I want to make clear on the record here, have you knowledge, Mr. Townsend, of any plan on the part of anybody to dispose of anything like 10 percent of the du Pont stock over the next five years?

A. No, sir.

Q. In your analysis were you informed that there were any substantial sales in contemplation?

A. No, sir.

Q. And what you have just testified to is a hypothetical situation?

A. That is correct, sir.

Q. Have you in connection with your testimony here charted the market performance of du Pont and Christiana shares during the period that this merger has been under consideration?

A. We haven't charted it but we have put together a tabulation of du Pont and Christiana's market prices and volume.

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and if you will, a relative index, such as we were talking about in these secondary issues relating to each of them.

Mr. Gribbon: May I ask that there be marked for identification as Applicants' Joint Exhibit No. 7, a six-page statistical preparation captioned "Market Study of Christiana Securities and Du Pont Common Stocks, Morgan Stanley and Company."

(Applicants' Joint Exhibit 7 was marked for identification).

By Mr. Gribbon:

Q. Was Applicants' Exhibit No. 7 prepared under your supervision and direction?

A. Yes, it was.

Q. And is it the series of tables showing the relative performance of du Pont and Christiana stock?

A. Yes, sir. It is a list of Christiana's daily bid price and volume and du Pont's closing price and volume for each day of 1972 and for a few days in early 1973.

Q. Would you explain to us how you have integrated into these charts your Dow Jones Index?

A. Yes, sir. It also shows, I should say, the closing Dow Jones Industrial Index on each day during the period, as well as the Standard and Poor Chemical Industry closing price and index and a relationship of the du Pont price index to the Standard and Poor's Index which we should leave

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aside for the moment.

If you will turn to page 2, let me recall for you-all that the merger—proposed merger, the fact that the companies were studying it, was made—an announcement of

that was made on April 28, 1972. So that in order to measure our index we had to—what we did was in a fashion similar to that on the previous charts we went back to April 10th and called that our base date. And if you-all keep looking at columns headed G and M, column G is the relationship of Christiana to the Dow Jones, and column M is the relationship of du Pont to the Dow Jones. So that if you look in those two columns, on April 10th you will find the figure 100.

Q. April 10th, then, prior to the announcement of the merger?

A. Prior to the announcement that the companies were studying the possibility of a merger.

Q. This gears the price of Christiana and the price of du Pont to the Dow Jones at 100 on that date.

A. Yes, sir.

On the date of the announcement, April 28th, you will note that as of the closing that day Christiana had gone to 101.795 as an index number, and du Pont had gone to 96.95. The announcement was made after the closing of the market so that the effect on Christiana did not appear until the following trading day, which was Monday, May 1st. And

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you will see that Christiana's index number on that day was 106.585 and du Pont's had decreased a little bit to 96.6.

The next significant date in this process—you should keep your eye on column G throughout the next page and column M throughout the next page, and you will see that in Column G as the year—as the month went along Christiana increased from the 106 level to about 115 down at the bottom of the page. Du Pont went somewhat lower

and then itself began to come up so that it was at about 95 at the bottom of the page, corresponding to July 7th.

On July 17th the exact merger terms were announced, namely the 1.123 shares of du Pont for each share of Christiana common. And if you look, Christiana had continued to improve relative to the Dow Jones, and following the announcement of the merger terms increased gradually up to a point so that by the time you get down to the early part of September at the bottom of the page it was at a relative index of 132 and 133.

It is interesting to note in column M what happened to du Pont. Du Pont also seemed to be increasing gradually. There was no significant move on the date the merger terms were announced. But that in early August du Pont went up over a hundred and continued to stay there, and itself seemed to fare better than the Dow Jones Industrial Average.

Q. This was after the terms of the merger had been

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announced.

A. August 7th was about three weeks after the merger terms were announced, yes, sir.

Q. Du Pont was better than Dow Jones during that period?

A. Relative to the base date, yes, sir.

Now, page 5, again keep your eye on these two columns. There was a very significant drop-off in both Christiana and du Pont on September 25th. This coincided with a preliminary announcement by the company that its third-quarter earnings would be flat. This was in an environment where its first two quarters' earnings had been substantially ahead of 1971. So that it is our view that the six-point drop in du Pont that day resulted from that and not from the merger.

Q. Six-point in the price of du Pont, not Christiana.

A. I am sorry. That's correct.

Following the index columns G and M, Christiana seems to be decreasing somewhat, and by the end of—or the early part of November it had been announced that some shareholders wished to participate in hearings relative to the exchange ratio, a number of people began—you can see in the trading volume in October and then toward the end of the year there was a pick-up a little bit in the trading. Christiana's relative index appeared to decrease.

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Du Pont's meanwhile staying reasonably level in the 96, 97, 98 area.

The largest decrease in Christiana's relative index occurring on November 27th probably reflects the fact that that Sunday an article had been published in the New York Times again commenting upon possible difficulties the merger would have. And as you can see, Christiana's relative index fell from 120 to 115 and then proceeded to go down to 102 and has gradually remained at the beginning of the year around 113.

Again the du Pont index—relative index seems to be in the—early on in the 97, 98 area; 92, 93 area, and 96, 97 area at the end of the period.

Q. Now I would like to ask you to direct your attention to the market behavior of du Pont's stock following, first, announcement that a merger with Christiana was under consideration, and then following announcement of the actual terms of the proposed merger. What impact do you see in this record on the price of du Pont stock?

A. Following the announcement that the companies were considering the proposed merger, there does not seem to be any significant effect on the relative index of

du Pont stock versus the Dow Jones. Following the date the terms were announced——

Q. July 17th.

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A. —which was July 17th, about three weeks later than that—well, during that period from July 17th to August 7th when du Pont's relative index exceeded 100, the announcement of the terms, if anything, seemed to have had a positive effect on the performance of du Pont.

Q. That announcement you referred to included not only the terms but agreement in principle to merger, did it not?

A. I believe so, yes, sir.

Q. If buyers envisaged that the merger would have an adverse impact on the value of du Pont stock, would you have expected them to rush in to sell after the merger terms had been announced?

A. Well, I don't—maybe rush is not the right word. Certainly investors anticipate the effect of future events, and certainly if du Pont holders felt that the merger would be injurious to them in the long run, the fact that the merger was announced and not yet effectuated—the fact that it was not yet effective would not cause them to delay disposing of their securities.

Q. Do you see in this performance, either the price or the volumes, any basis for inferring that significant numbers of du Pont shareholders did attempt to sell after the merger terms had been announced?

A. There is no information in this tabulation that

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leads me to that belief.

Q. Looking at it from the Christiana side, what conclusions can you draw from the performance of the Chris-

tiana stock as to the effect of the announcement of the merger terms on that value?

A. I think one can see an increase in the volume of Christiana being traded following, first of all, the announcement that the companies proposed to merge, particularly in the mid-June period, and then specifically after the merger terms were specifically announced toward the end of July. There was a substantial pick-up in Christiana volume. And without having made an exact analysis or a tabulation of the daily average volume, inspection by eye would lead one to believe that the volume of trading of Christiana was on a somewhat higher order following the announcement of the merger terms than it had been previous to that. It is interesting also to note that in October, mid-October, immediately prior to the release appearing in the Wall Street Journal on the request for a hearing there was a pick-up in volume of Christiana. This coincided with an increase in its market price.

There was also an increase in volume of Christiana's common stock this time accompanied by a decrease in its market price, following the New York Times Sunday article in late November. So that one could hypothesize that if

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arbitragers or people anticipating advantage by buying Christiana early on were now of the opinion that the merger might not take place, they were disposing of the positions they had established in Christiana.

Q. Have you examined the prices at which Christiana was selling during this period following July 17th with a view to determining whether a Christiana shareholder could at any time have received by selling his stock the value that he would obtain if the merger with du Pont went through?

A. Yes, sir, we have. That is not contained specifically on this, but I can give you some reference numbers if you would like them.

If prior to the announcement that the companies were considering the merger one looks at the relationship of Christiana's price to the value they would receive, one can say that Christiana say in mid-April—the market price of Christiana represented a discount of about 24 percent from the value they could receive. Following that April announcement there was a steady decrease in that discount number. And following the specific merger terms on July 17th there continued to be a decrease. So that in August and September the discount was in the area of 5 to 5½ percent, and in mid-October had gone down—well, in mid and late October had been as low as 4 percent.

Q. What do you mean when you refer to a discount of

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5 percent and 4 percent?

A. This is the market price per share of Christiana relative to the 1.123 shares of du Pont at its market value, and the difference—Christiana slightly lower than the 1.123 times du Pont. And the measure of that difference is the discount I am speaking of.

Q. Having that in mind, how close could a Christiana shareholder have come to realizing in August and September the values that ultimately would go to him if the merger were to be consummated?

A. As I said, it reached a minimum of 4 percent. He could have come within 4 percent of the underlying value he ultimately would receive.

Q. And do you notice in the figures any significant increase in trading when the values got that close together?

A. Well, when the discount got to as little as 4 percent we did notice an increase in Christiana trading. This occurred in about the third and fourth weeks of October. And that was accompanied, as I said, by an increase in Christiana's market price.

Q. For how long a period could a Christiana shareholder have obtained something close to 94 or 95 percent of the value of the 1.123 shares of du Pont he would have received on consummation of the merger?

A. Well, looking at it the other way, as a discount

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of 5 to 6 percent, the discount got as low as 5 percent in August, early August, and did not exceed 6 percent until the middle of November. So that that would be three plus months, sir, during which the discount was within 5 to 6 percent of his underlying value, or turning it around the way you have said, he could have achieved 94 to 95 percent of what he ultimately might have received had he waited for the merger to go through.

Q. Now, viewing the market activity in Christiana stock during that few months period when the shareholder could have obtained 95, 96 percent of what he would ultimately get if the merger took place, can you draw any conclusions as to whether the body of Christiana shareholders are oriented to profit-taking?

A. I would say, sir, that even though the volume did increase over what it had been before, it was not such a significant amount of trading in Christiana that would lead me to the conclusion that a significant body of Christiana shareholders are so oriented toward profit that they would take advantage of a similar opportunity.

Q. Have you any explanation to offer as to why a greater number of Christiana shareholders did not elect to

buy when the market increase was of the magnitude you have described—to sell. Elect to sell?

A. No, sir. The reasons I think I outlined before.

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A substantial tax cost to them if they sold; the fact that they were continuing to be potentially—if the merger went through they would continue to be in effect du Pont stockholders. Many of them had held the stock for a long time. I would guess that these are the principal reasons, sir.

Q. Have you any views as to whether large stockholders of Christiana might have been expected to sell at this time when the stock was selling at a very small discount?

A. They might not have been able to, sir, in any size, because of the fact that sales by them probably would have had to be subject to a registration statement under the '33 Act.

Q. So is it fair to say that your conclusions would be confined to the smaller body of the Christiana shareholders who were free to sell at any time?

A. That is correct, sir.

Q. Now, earlier in your testimony you referred to services for Christiana that Morgan Stanley has performed in connection with Christiana's tax claim against the United States. Do you recall that testimony?

A. Yes, sir.

Q. What is the nature of the advice and opinions that Morgan Stanley has rendered to Christiana in that matter?

A. We were asked to provide Christiana an estimate of

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the fair market value of the blocks of General Motors stock that they received from du Pont, namely 6,700,000 shares

in 1962, 4,800,000 shares in 1964, and 6,700,000 shares in 1965. Now, the nature of that advice, as I say, was to give them our estimate as to fair market value.

Q. What was the purpose of the ascertainment of fair market value?

A. The company would use that fair market value in substantiating the tax that it had to pay to the government because the receipt of those shares by Christiana was a taxable event.

Q. What did you understand to be the measure of fair market value in the transaction you were examining?

A. A fair market value for that purpose is what a willing buyer would pay a willing seller in cash for that asset.

Q. At some particular time?

A. On a specific day, on the day the distribution took place from du Pont to Christiana.

Q. Did Morgan Stanley assist Christiana in determining what a willing buyer would have paid for these blocks of shares on the days received by Christiana?

A. Yes, sir, it did.

Q. And what was your opinion? What was the ultimate conclusion that you came to in advising Christiana as to the

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fair market value of those three blocks?

A. We advised Christiana that it was our view that these blocks had a value which was less than the aggregate number of shares times the then market price of General Motors stock by varying amounts depending on market conditions at the time and other factors.

Q. What factors did you take into account in determining how much less than market value could be realized by Christiana upon the sale of those shares?

A. Well, in the first place, we concluded that the way to maximize the value of each of those blocks was to have it sold in an underwritten secondary offering to the public; that that was the mechanism that would achieve for Christiana the largest value.

Now, again with the announcement of an offering of the size of the blocks in question on those specific dates and given those market conditions on those three dates, we estimated in each case there would be a market impact. In the first case I believe it was seven and three-quarters percent.

Q. What do you mean by a market impact?

A. That the announcement by itself of an offering of this size in that market would cause the market price to go off, and in the case of the 1962 distribution, seven and three-quarters percent.

To value the block, however, we looked at it from

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Christiana's point of view as to what given that market effect—what then might have to be done to encourage buyers to come in and absorb the block. And in many cases it seemed that an offering price underneath the market has to be made in order to coax buyers in to absorb large blocks of stock. So that to the market impact we added another factor, namely the discount of the public offering price from the market price. And we also added a third factor, namely the underwriting spread or what Christiana would have had to pay an underwriting syndicate to market that block. So that it is these three factors: Market impact, market price discount from—the public offering discount from the then market, and underwriter's spread. And that the total of these three, we told Christiana, we suggested to Christiana, should be deducted from the market price of General Motors in coming up with a fair market value for that block.

Q. On the first block of—you said I think about 6,700,000 shares of General Motors?

A. Yes, sir.

Q. What was the net result of applying these three factors to the market value of the shares?

A. I believe the discount was a total of 14 percent from the then going market of General Motors on that day.

Q. Is it fair to characterize your opinion as being that you advised Christiana that if they attempted to sell

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the 6,700,000 shares on the day of receipt, they would have received net in-pocket for them something like 14 percent less than the market value quoted on the stock exchange that day?

A. That is correct, sir.

Q. Now, in analyzing the merger terms between du Pont and Christiana did you take into account the analyses that you had prepared for Christiana in connection with its tax case?

A. To say we had taken them into account——

Q. You were aware of them.

A. We were aware of them, yes.

Q. Did they have any application to the study of the merger terms?

A. None really. None whatsoever.

Q. Could you explain that, why you feel there is no application?

A. Well, in the first place, the evaluation of GM in the tax case, we had to give our views as to a cash value on a given day for a block of stock that was large and there were difficulties in obtaining that value. In the merger we are dealing on a share-for-share exchange. Du-

Pont is giving out du Pont stock and getting in du Pont stock, in essence. And in our view it is a completely different kind of transaction.

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Q. Mr. Townsend, do you see any inconsistency in the view you expressed in the Christiana tax cases and that you have expressed here as to fair terms in a merger between du Pont and Christiana?

A. No, sir, I don't, for the reasons I have just stated.

Q. In your opinion as an investment banker, do the merger terms that have been agreed upon by the parties here meet the standard of Section 17 of the Investment Company Act as being fair and reasonable and representing no overreaching on the part of anyone?

A. Yes, sir, they do.

Mr. Gribbon: I think that concludes the direct examination on behalf of both of the applicants.

Judge Ullman: Off the record.

(Discussion off the record)

Judge Ullman: On the record.

Mr. Townsend, I am going to excuse you at this time, and of course you will return after lunch for cross-examination.

The Witness: Thank you, sir.

(Witness temporarily excused)

Judge Ullman: Mr. May has indicated that he has about two or three minutes testimony which he would like to give. And if there is no objection, I will allow Mr. May to

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take the stand at this time, and in the event that there is no extended cross-examination—or let me put it in the event there is no cross-examination of Mr. May, he indicates that it will not be necessary for him to continue his appearance. So rather than require Mr. May to withhold his testimony until the normal time at which he will be reached, if there is no objection I will take his testimony at this time, with the understanding that if there is going to be cross-examination, we may defer the cross-examination until an appropriate time.

Is there any objection?

Mr. Gribbon: No objection.

Mr. Broderick: No objection.

Mr. Maher: No objection.

Judge Ullman: All right.

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By Mr. Collins:

Q. Was there any fear, was there any thought when you made your appraisal that if you made an appraisal that was against the personal financial well-being of the directors and the officers—chief officers of du Pont and Christiana—was there any fear that you would possibly lose future business coming from du Pont?

A. Absolutely not, sir.

Q. No mention has been made so far, Mr. Townsend, as to any fee that Morgan Stanley will receive for its work

in this merger negotiation. Now, could you give us a rough idea of what the fee of Morgan Stanley will be? Or do you care to answer that?

A. I would be very happy to answer. We have suggested to the companies that our fee be between $200,000 and $250,000.

Q. Mr. Townsend, I am going to ask you some questions, principally in relation to your letter—Morgan Stanley's letter of July 7, 1972, addressed to du Pont and Christiana. So would you please get that letter?

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A. My recollection is—and this may not be 100 percent accurate—my recollection is that we employed—as far as tax matters is concerned, we asked for that advice from Davis Polk & Wardwell. On the background as to the 1940 Act we asked both firms.

Q. All right. Now, going to page 4 of your letter, the last paragraph at the bottom of page 4, you say that it is appropriate to consider Christiana's value in terms of the market value of its underlying investments which is the normal way of valuing investment company stock. Now, do you put any qualification on that? Would you say that that is correct regardless of the cost basis of the investment company's assets? In other words, if you were considering an investment company that had two billion dollars worth of assets with a cost basis of $2 billion and the same company if it were in the position of having $2 billion of market assets with a cost basis of, say $200 million, would the same consideration apply?

A. I think from the standpoint of where you start out in valuing the investment company you do start out at the net value of the underlying assets, yes, sir.

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Q. • • • Now, there you are talking about the possible merger of Christiana with another company other than du Pont. Now, let me ask you, in your opinion, does Christiana control du Pont?

A. I am afraid, sir, I can't have an opinion on that. The companies have disclaimed control for many years.

Q. But you have no opinion?

A. I have no opinion on that.

Q. You have been familiar with du Pont and Christiana for many years—your firm has.

A. Yes, sir.

Q. Have you individually watched Christiana and du Pont?

A. Yes, sir.

Q. But you have no opinion on whether Christiana controls?

Mr. Gribbon: Your Honor, I object. The witness has answered that question to the best of his ability.

Judge Ullman: Overruled. He may respond again.

The Witness: Mr. Collins, let me say that I have no reason to doubt the company's statements that Christiana does not control du Pont.

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Judge Ullman: Mr. Murtaugh?

Mr. Murtaugh: Yes, I would like to ask some questions.

By Mr. Murtaugh:

Q. The 2½ percent discount from net asset value that is received by du Pont represents a gain of about how much per share for each du Pont share in terms of dollars?

A. Well, $55 million, sir, divided by 47 million shares, so it is something over a dollar a share.

Q. And that is going to produce presumably about 3 cents more income?

A. If the merger is carried out on the proposed basis, looking at du Pont's 1971 earnings there would be an increase of 3 cents a share in du Pont's earnings.

Q. Now, you testified this morning that you thought it would be unfair and unreasonable and over-reaching if a person dealing at arms' length on behalf of—I am putting words into this—persons dealing at arms' length on behalf of du Pont shareholders in a situation where they potentially were presented with an opportunity to get 3 cents per share earnings or a dollar—a little over a dollar in terms of buried value, and the other side to the transaction—and it takes two sides to make a transaction. And the other side to the transaction is getting over a half a billion dollars and getting a better security and getting it tax-free,

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you would think that it would be unfair of a person who can't force a merger to insist on sharing the benefits of that transaction?

A. Sir, again I don't mean to argue, but I don't recall having said exactly what you have said. But looking at it from the standpoint of Christiana—and you I hope will remember that we were advising them in this transaction too—

Q. Yes.

A. —that given the substantial body of precedent it would have been very difficult to advise Christiana that a discount of over 2½ percent was something that the negotiating committee should accept.

Q. You have had a good deal of experience with mergers in general, I presume, and advising people on one side or another of them, have you not?

A. Yes, sir.

Q. Very frequently it happens that the people that think they may have a deal going find that circumstances permit the deal from being acceptable to either side. Isn't that correct?

A. That is correct, sir.

Q. And the merger then falls.

A. That is correct, sir.

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A. ° ° ° Mr. Murtaugh, the earnings for du Pont net income per share was up from 686 to 737 in 1971.

Q. While you are there, what were the earnings for the two preceding years?

A. Why don't I read them all to you. Starting in 1967, the earnings per share were $6.73. In 1968, $7.99. In 1969, $7.62. In 1970, $6.86. And in 1971, $7.33.

Q. Thank you very much.

Now, are you familiar with Vicker's Favorite 50 publication?

A. I am familiar with what it is, yes, sir.

Q. I haven't been able to get my hands on it but the

last time I saw it du Pont wasn't on it. Is it on it now, do you happen to know?

A. I don't know that, sir.

Q. It was on it in 1965, wasn't it, or do you happen to know?

A. I don't recall that, sir.

Q. Is it one of the favorite investments of mutual funds?

A. That would be reflected in Vicker's Favorite 50, because that is a publication that refers to mutual funds, yes, sir.

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Q. And while everybody might not agree as to the effect of it, at least something is being added to the total operation by the merger of two companies. Isn't that correct? And ordinary merger?

A. That generally is hoped for, yes, sir.

Q. At least that is the reason that the merger is gone into, isn't that correct?

A. It frequently is a reason, yes, sir.

Q. And take this proposed merger here. Do you see anything very aggressive as far as the industrial progress of du Pont is concerned by this merger?

A. Well, if I understand what you mean by the industrial progress, du Pont is not acquiring other industrial facilities.

Q. Well, it seems to me that we should think in this situation as to what motivates people to approve mergers as a general thing. It is for some sort of a real improvement in their situation; isn't that correct?

A. It is for the advantages that a merger will produce, yes, sir.

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Q. There are very few mergers that are undertaken to produce an advantage of $1.10 a share or 3 cents in earnings, isn't that correct?

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(Whereupon, from 3:22 to 3:35 p.m., a recess was taken.)

Judge Ullman: The hearing will please come to order. Mr. Murtaugh, do you have further questioning?

By Mr. Murtaugh:

Q. Turning to the market value of Christiana shares as it was two weeks before the announcement of the consideration of the merger, I believe you testified it was, what, 27 or 23 percent below the net asset value at that time?

A. The figure I gave this morning, sir, was it was 23 percent below the equivalent value of 1.123 du Pont shares.

Q. Yes. Oh. Not of 1.15?

A. No. The figure that I gave actually was that of the calculation I just mentioned.

Q. Yes, I see.

Now, I don't think it is in one of your studies. Have you observed the studies of your co-advisors here, Kidder, Peabody and First Boston Corporation?

A. Yes, sir, I have read them over.

Q. There is an indication in one of the exhibits of Kidder, Peabody that Christiana Corporation shares were selling in reasonable relation to comparable shares of

closed-end investment companies. Would you agree with that in general?

A. In general, yes, sir.

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Q. ° ° ° Now, after listening to that statement, kindly, do you think—still, my difficulty is in seeing why you claim it is just an exchange of shares.

A. No, frankly, sir, I don't see why you have difficulty in seeing that point.

Q. I mean even if the market impact is very severe, would that make a difference as to—if it was conceded that the market impact would be severe and prolonged?

A. In the first place, sir, we believe the market impact will not be severe.

Q. But your point would be just as good if it was severe, wouldn't it?

A. That was not—the fact or the possibility of the market impact being severe, if that had to be acknowledged as a fact, as a factor, that would certainly have to be taken into account.

Q. Now, the fact that there is the possibility of a severe market effect in the putting of Christiana into position to gain a 30 percent increase in value wouldn't be a factor to be taken into account, though, would it, in your opinion, apparently?

A. Well, I have to come back and repeat, sir, as I said a moment ago. I think after looking at the factors involved, we have reached a judgment that there is no possibility that there will be a severe market impact.

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A. ° ° ° We also asked ourselves at what point would the other side to the transaction decide it wasn't worth going through with it. And we came to the conclusion in looking at the other side that after a certain point, if you will, after a certain penalty has been reached, anything beyond that would lead the shareholders of Christiana, and particularly the tax-exempt shareholders, to consider the transaction was too costly to proceed.

Q. So that you reached that conclusion both from advice from lawyers and your own reckoning?

A. Yes, sir.

Q. Now, is it fair to say that in the last two to five years that Christiana has sold at a discount of 20 to 25 percent from its net asset value?

A. Well, I think it has sold at discounts that high. I don't recall exactly over the past five years what the range has been.

Q. Well, over the last two years would you say that it has been fair to say that it sold at a discount of 20 percent?

A. Well, again, as I say, I am not sure of my figures for the last—any period. But let me say to you that I agree with you, Christiana has sold at a discount from its net asset value, and at times as high as 20 percent.

I don't mean—pardon me. I don't mean to be difficult.

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It is just that I am not sure that those ranges are exact or that that number is exact.

Q. Well, would you be safe in saying that it has sold at a discount throughout the last two years, at a 10 percent discount?

A. Well, again I prefer not to quantify it.

I am not sure I have figures here. Let me see if I have figures here which would help me answer your question. If I may suggest, sir, in Exhibit 9 of the exhibit control to our report dated July 7th—if you have that.

Q. Yes.

A. The last column indicates for the period—and these measurements are taken each six months. But commencing with the date December 31, 1967, the discounts have ranged from 15.7 all the way up to a discount on March—well, no, it is the week ending April 7th, if I read this correctly, of 28.3 percent.

Q. As I read this same exhibit, the lowest discount figure, I get the percentage 13.4 percent.

A. Yes, sir. On June 9th. And that followed, of course, the announcement on April 28th that the companies were considering the question of merger.

Q. Absent this proposed merger, do you know of anything that could reasonably lead to the belief that Christiana common stock would sell at any less a discount than

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13.4 percent in the next two to three years?

A. You say absent the proposed merger?

Q. Yes, sir.

A. Well, I hope I am responsive to your question. There have been times when certain events have occurred which have caused Christiana's discount to close right up, to become a very small figure. One such occasion was the General Motors exchange offer where the company offered General Motors at very nearly equivalent to net asset value to Christiana stockholders in an offer to exchange them.

The discount closed up to somewhere in the area of 5 to 8 percent, I believe, at the time of the Hercules exchange offer in 1967. I don't know whether that is responsive to your question.

There have been times, in other words, when this discount has closed up.

Q. Well, in considering that answer, if you will go to page 14 of your letter dated July the 7th to du Pont and Christiana, does the first paragraph on page 14 for all practical purposes eliminate such possibilities as you mentioned?

A. Are you speaking specifically of the third sentence in that paragraph, sir?

Q. I am stating that you said that it would be—that the discount has been lessened when Christiana went to its

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stockholders and said we will exchange Hercules for our stock. Now, those times have been in the past.

A. Correct.

Q. Do you believe that as a practical matter there is any reasonable expectation that Christiana would do such a thing in the next two to three years?

A. No, sir. The tax law was changed I think in 1969 to make this less advantageous. Now, whether or not Christiana notwithstanding would make an exchange, I don't know.

But you are correct, the tax law has changed.

Q. Well, then, getting back to my same question, can you think of any other possibility of an event that would occur in the next two to three years that would—absent this proposed merger that would make Christiana sell at less than the 13.4 discount from net asset value?

A. Well, it is only an assumption. I would assume that it probably would not sell at less than 13.4 percent absent the proposed merger.

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By Mr. Collins:

Q. As a businessman, forgetting about the legal implications and the legal technicalities of this merger, would it make any difference to you if you were an appraiser making a report on this proposed merger or whether you were merely a stockholder in one of these two companies—would it make any difference to you whether Christiana merges into du Pont and du Pont is the surviving corporation or whether it was reversed and du Pont merged into Christiana and Christiana were the surviving corporation?

A. Well, I haven't thought that whole thing through. I am a bit confused thinking of it turned around.

I really don't know that I can say at this moment off the top of my head whether it would make any difference to me.

Q. Well, can you think a little bit and——

A. Well, specifically what is it that you would like me to comment on?

Q. What I am getting at is this: That under the present terms Christiana is going to merge into du Pont and the Christiana stockholders are proposing to get paid off

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at 97½ percent of their net asset value.

Now, if the situation were reversed, and assuming that legally it could be done, if du Pont were to merge into Christiana, would a stockholder of du Pont having one share with a market value of, say, $160 a share—would you say that he should get $160 of market value of Christiana, would he get that, or would he get a fractional share of Christiana representing, say, 95 percent of a share of Christiana because one share of Christiana is one-plus share of du Pont?

A. Well, sir, again I apologize for not being able to think awfully quickly about this, but it seems to me that whether du Pont merges into Christiana or Christiana merges into du Pont, the substance of the transaction is the same, and that in determining what the proper basis of exchange would be one would start off looking at Christiana's net asset value. And of course, whether du Pont merges into Christiana or Christiana merges into du Pont, the net asset value—the market value of Christiana will approach Christiana's net asset value and the discount will disappear, because it will no longer, in effect, be a holding company; it will be an operating company.

Q. On or about the time of the merger the market value of Christiana was $160 a share. I am trying to find what the market value of common stock of du Pont was at that same

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time. I believe it was roughly $180 per share, making a quick mathematical computation in my head. No, my figures are wrong.

Let's take June 19th. On June 19, 1972, Christiana was quoted at $154 per share and du Pont was quoted at $167.25 per share. Now, if the merger had been arranged so that du Pont was going to be merged into Christiana

with Christiana being the surviving corporation, would you say that the merger terms would be that each common stockholder of du Pont would get something like $167 of market value of Christiana, or would you have said that the common stockholder of du Pont who is going to get Christiana stock should get Christiana stock worth the net asset value of Christiana?

A. Well, if I understand your question, I think I have answered it—maybe not clearly enough.

As I said, I think whether du Pont merges into Christiana or vice versa, the substance of the transaction is the same, and in effect you eliminate a holding company, because the resulting effect, whether it be named Christiana or du Pont, is an operating company. And what market price discount as exists for the holding company will cease to exist, and whatever price—and I don't know what the numbers would be if you announced it that way. Whatever price the Christiana share would be, the market value, if that

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were equivalent to net asset value, there would be a proposed arrangement I would suspect not unlike the one we are talking about today; in fact, exactly similar. And I say that irrespective of the way the merger flows.

Now, as I say, I have only had a few minutes to think about this, but I think if you strip all the directional signs away, I think you will find that the transaction is essentially the same transaction, whether the company ending up is called Christiana or whether it is called du Pont.

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Q. One final question. And at the risk of being repetitious, I asked you this identical question yesterday. In

your personal opinion based on a knowledge of these two companies over a period of years, does Christiana control du Pont?

A. As I think I said, and I hope I can give you an identical answer to the one I gave you yesterday, I have no reason to believe that what the companies say in public is inaccurate.

Mr. Collins: Thank you, sir.

Judge Ullman: Does the Division have questions?

Mr. Osheroff: There is one more participant, Your Honor. Is he going to ask questions?

Judge Ullman: Mr. Maher has indicated he has no questions.

Mr. Anderson: Yes, Your Honor, the Division has some questions.

Judge Ullman: You may proceed.

By Mr. Anderson:

Q. Mr. Townsend, does Morgan Stanley write a lot of reports of this type?

A. Well, sir, we write a number of reports in which we make recommendations as to merger exchange ratios, yes, sir.

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Judge Ullman: ° ° ° Please have it marked Division's Exhibit No. 1, and we will mark the letters with a subsequent number.

(Division Exhibit 1 was marked for identification.).

By Mr. Anderson:

Q. Are you familiar with that?

A. Yes, sir, I am familiar with this document.

Q. I would like to look at it also. This is the only copy I have. I am sorry.

A. Yes, sir.

Q. Mr. Townsend, is this the letter containing the written instructions you received from du Pont and Christiana?

A. Yes, sir, it is, sir.

Q. Are these the only written instructions you received?

A. I believe so, sir.

Q. I refer you to page 3 of this exhibit, Division's Exhibit No. 1 for identification, Mr. Townsend.

A. Do you mean, sir, page 3 of the attachment or so-called appendix, Attachment 2?

Q. Yes, that is correct.

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A. Yes, sir.

Q. The first full paragraph which reads "From du Pont's point of view, the most favorable terms of a merger would be those that approach the full amount of the discount."

Do you agree with that statement, Mr. Townsend?

A. Well, I guess—yes, sir. What the memorandum is speaking of there is the market discount of Christiana common stock, and certainly if du Pont could acquire Christiana at that discount it would be favorable.

Q. What do you see as the most significant reasons that du Pont will not be able to acquire Christiana's stock on that basis?

A. I believe we said, sir, that we felt that Christiana would not go along with a proposal of that type. It would be too costly to them.

Q. Is that based on your contact with Christiana or is that based on your anticipation of how the Christiana shareholders would react?

A. Well, as I think we have said, it is based on the fact that in a great many transactions of this type in the past the discount from market value was given very little, if any, weight in the proposed merger terms, and secondly, that as I think I spoke to these gentlemen here this morning, if the Christiana shareholders got less than what they felt to be their underlying interest in du Pont they

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would not be agreeable to going along.

Q. Referring to the last paragraph on the same page, Mr. Townsend, which reads "The report should indicate whether on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value of Christiana in the merger negotiations."

Did Morgan Stanley initially proceed on that assumption?

A. Yes, sir. As I think was brought out in direct testimony, we understood—or we assumed that a Section 333 liquidation would be available to Christiana up until the last few days, and in fact until even after the June 30 meeting in Wilmington.

Q. Mr. Townsend, I show you a letter dated June 20, 1972, from Dechert Price and Rhoads, to Messrs. A. Felix and Edward B. du Pont, of 15 pages, and in addition a letter—excuse me. In addition, a letter from the same parties to the same—excuse me, from the same parties, Dechert Price and Rhoads, but this time ad-

dressed to yourself, Mr. Charles C. Townsend, Jr., dated July 8, 1972, of one page, which attaches a letter of July 5, 1972, from Dechert Price and Rhoads, to Messrs. A. Felix du Pont, Jr., and Mr. Edward B. du Pont, of two pages.

Mr. Anderson: I would ask that they be marked

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Division Exhibits 2-A and 2-B, 2-A for the letter of June 20, 1972, and 2-B for the cover letter of July 8 with the attached letter of July 5th.

Judge Ullman: The reporter will please mark them.

(Division Exhibits 2-A and 2-B were marked for identification.)

By Mr. Anderson:

Q. Have you seen these letters before, Mr. Townsend?

A. Yes, sir, I have.

Q. Are these the letters that informed you that in the opinion of Dechert Price and Rhoads the Section 333 tax liquidation would no longer be possible?

A. One of the letters is, sir. The earlier letter attempted to set forth the amount of the tax payable by the stockholders of Christiana in a Section 333 liquidation. That letter—I don't recall that it was signed. Our copy was an unsigned copy. That letter was dated June 20, 1972, and it was that letter which set forth the maximum and minimum tax figures that came out in direct testimony yesterday, approximately $40 million, or actually 38,999,000 for the lower number—and that is page 13—and the figure of 70,120,000, which is on page 14. These figures I believe came out in the direct testimony yesterday.

Q. Is the figure of 70,120,000 an accurate forecast of the amount of taxes that would fall due on Christiana

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or fall due on Christiana's shareholders if a Section 333 liquidation was undertaken?

A. I believe, sir, it is on the shareholders of Christiana, both preferred and common.

Q. I don't remember, Mr. Townsend, if you testified yesterday what—in effect that would be what type of a discount from Christiana's net asset value?

A. Well, I think the higher figure, or 70 million, was equivalent to approximately 2.8 percent of net asset value.

Q. And was that figure later revised? That is, was it later determined that figure could not be relied upon as an accurate maximum amount of tax which would have to be paid?

A. Well, we said, sir, that given the 2.8 percent, we assumed that if Christiana determined to proceed under a Section 333 liquidation it would perhaps achieve a lower tax figure, and thus we looked at a 2 percent maximum discount in the merger exchange ratio at that time as being the maximum which the Christiana shareholders should probably wish to accept.

Following our being informed that the 333 was no longer available, we did not have that 2.8 percent benchmark and we felt that under those circumstances the Christiana shareholders should be willing to agree to a somewhat larger

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discount, namely 2½ percent.

Q. Is it your understanding that at the present time, Mr. Townsend, the reason that Section 333 liquidation cannot be undertaken is that it is not possible to accurately

calculate the amount of tax that would be incurred if such a liquidation was undertaken?

A. I think the problem—and I am not really competent to tell you what the answer is. I think the problem, however, is the inability to determine—certainly it was at the time, inability to determine in the necessary timeframe the amount of earnings and taxes of Christiana upon which the tax would be based.

Q. Do you know if subsequent to that time such calculations have been made?

A. I don't know whether they have or not, sir.

Q. Then it is not your understanding that there is any legal impediment to a Section 333 liquidation, but only that it would possibly cause too high a tax burden on the Christiana shareholders?

A. I don't know—all I can say, sir, is that it wasn't possible within the time span we had available to reach a decision as to what the taxable earnings and profits would be and thus what the tax would be. That does not mean to say that I don't consider it feasible. I really am not competent to judge whether it is feasible.

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Q. And on page 21 of that report, the middle paragraph, when you write "In light of the foregoing analysis of the proposed merger it appears that Christiana probably would not be justified in accepting a discount, in the form of market value of du Pont common stock, greater than what would be received in a Section 333 liquidation," how do you reconcile your tying of the amount of discount justifiable at this time when you thought a Section 333 liquidation was available to your justifying a discount higher than this when you didn't think a Section 333 alternative was realizable?

A. I think as we explained yesterday, in the light of the possibility of a 333 liquidation wherein the maximum cost would be 2.84 percent and the minimum substantially less than that, we thought that at that time Christiana was justified in not agreeing to a maximum discount for merger purposes larger than 2 percent. When it became apparent that we couldn't quantify, if you will, or could not assume that a Section 333 liquidation were possible, we reconsidered our view and determined that in the light of that Christiana probably should be prepared to agree to an increase in the maximum merger discount and increase from 2 percent to 2½ percent.

Q. How did you determine that the proper amount of increase would be ½ percent?

A. Well, as I tried to say yesterday, sir, this process

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is not one that is possible through use of a calculating machine or a slide rule. It was the combined judgment, however, of the group in the firm on these new circumstances that the 2½% percent was the right number.

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Q. Would you have liked to have known at that time what the tax impact on the Christiana shareholders would have been of a Section 333 liquidation?

A. It certainly would have been important to know that, yes, sir.

Q. What if you had found out that it would be a tax impact of five percent. Would that have influenced your judgment as to whether half a percent more would have been justifiable?

A. We certainly would have had to take it into account. Whether or not our judgment would have changed, I don't know, sir.

Q. Why didn't Morgan Stanley and Company consider this a matter important enough to wait the calculation of the tax impact—wait for the calculation of the tax impact on the Christiana shareholders? That is, isn't this a matter which would have significant impact on the amount of discount you could in good faith represent to the combined boards?

A. Well, I think you have asked me two questions there. First of all, didn't we consider it significant. In answer to that, which was your latter question, we considered that it was an important factor and a helpful benchmark.

As to why did we not wait until the number could be calculated, I don't know that we could have waited until that

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(Discussion off the record.)

Judge Ullman: You may proceed with your redirect, sir.

RE-DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Mr. Townsend, do you have a copy of the document that has been received in evidence as Division's Exhibit 1?

A. I believe I have, sir, yes.

Q. You did testify that Division's Exhibit 1 was received in the Morgan Stanley offices?

A. Yes, sir.

Q. Would you describe for us the various components of this document.

A. Yes, sir. The first component is the letter dated June 6 in which the special committees of the boards of each company asked Morgan Stanley to advise it with regard to the proposed transaction.

Mr. Gribbon: I might note, Your Honor, that the first two pages are precisely the same thing as Applicants' Joint Exhibit No. 3, simply another copy of it.

By Mr. Gribbon:

Q. What is the next component of Division's Exhibit 1?

A. The next component, sir, is a memorandum dated June 6, 1972, on the last page of which appears Covington and Burling—it is Covington and Burling's memorandum

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entitled "Factors to be Considered in Report of Investment Bankers."

Q. Was that document submitted to Morgan Stanley along with the covering letter here dated June 6 from the negotiators, as part of that?

A. My recollection is they were not. They were dated the same day and received approximately the same time.

Q. You did consider this second attachment here, the Covington-Burling memorandum of June 6, 1972?

A. Yes, sir.

Q. I would like to refer you to page 4 of that exhibit. Would you read the second full paragraph on that page.

A. Commencing, sir, "The distribution?"

Q. Yes.

A. "The distribution of du Pont stock to the shareholders of Christiana may provide an incentive for such shareholders to dispose of their holdings. While affiliates

of Christiana may be restricted in the amount and method of disposition of du Pont stock, a substantial portion of such stock will be freely marketable. Christiana is also considering whether its affiliates may seek registration rights for an underwritten public offering following the merger. The possibility that these factors may have a depressant effect on the market price of du Pont common stock should be considered."

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Q. And was that possibility considered in the analysis that you did?

A. Yes, sir.

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Q. In your direct testimony, or perhaps in cross, you referred to having received some sort of a written request that consideration be given to the possible depressant effect on the market price. Do you recall that? Perhaps this was in answer to Mr. Murtaugh's questions.

A. I think, sir, what I was referring to were the instructions of Covington and Burling asking us to take account of any possible depressant effect on the market price of du Pont, the paragraph I just read.

Q. That was received by you on or about June 6, 1972?

A. Yes, sir.

Q. And when did you render your report?

A. To the negotiating committees?

Q. Yes.

A. The final report, sir, on July 7th.

Mr. Gribbon: I might note for the record, your Honor, that I undertook to give Mr. Murtaugh a copy of the writing wherein Morgan Stanley was requested

to consider the possible effect on the market. This document is that writing, the five—or seven-page second component of Division's Exhibit No. 1.

By Mr. Gribbon:

Q. Would you look at the next component of Division Exhibit 1. What is that?

A. Yes, sir. This is a one-page memorandum to which

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had been attached a schedule. The schedule has been duplicated on two pages, but originally the memorandum was a one-page memorandum prepared by Treasury Division of du Pont dated June 13, 1972, and the title of the memorandum is "Effect of Compliance with Investment Company Act of 1940 on du Pont."

Q. Was that document submitted to you as an attachment or as any part of Applicants' Joint Exhibit No. 3 which was the engagement letter of June 6, 1972?

A. No, sir. It was given us separately by du Pont Company.

Q. Do you recall the approximate date?

A. No, sir, I do not.

Q. Division counsel have introduced as Exhibit 7 a seven-page document that I believe you identified as being notes that you had at the time of the meeting of the negotiators.

A. I did not identify them as such when being cross-examined by Mr. Anderson, no, sir.

Q. What are they? What is Exhibit 7?

A. Exhibit 7, the first two pages of Exhibit 7 are an outline of the procedures that we believed would be followed in pursuing the merger transaction. And this outline was used by me as introductory comment at the meeting of June 30th wherein we gave our view to the

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negotiating committees and their counsel.

Q. Was that document turned over to anybody, to your knowledge?

A. I believe it was not. I believe I used it myself.

Q. I ask you in particular to look at two schedules attached to that Division Exhibit 7. One of them computes realizable value for common stockholders in a Section 333 liquidation. This is not very well paginated. I guess it is page 1 of an attachment. Do you recall that schedule being called to your attention during your cross-examination?

A. Yes, sir.

Q. And the preceding document has another figure for net asset value.

A. Adjusted net asset value, yes, sir.

Q. Did you mean to testify that this earlier schedule showing adjusted net asset value was the amount that the Christiana shareholders would realize at the discount you had recommended?

A. No, sir. This was the adjusted net asset value. The figure that is comparable to the figure on page 12 of our July 7th report. 2,294,000,000.

Q. What comparability is there between that figure of 2-billion-249 and the realizable value shown on the basis of a 333 liquidation in the succeeding schedule?

A. May I turn to another page?

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Q. Yes.

A. I think the last page of this exhibit explains that. The figure for adjusted net asset value for Christiana as a whole of 2,307,000,000 is compared on the last page to the adjusted net asset value of Christiana after a Section 333

liquidation, and the factor that is put back into the 2,220,000,000 figure at the bottom of the page showing Section 333 liquidation, namely the realizable value for common stockholders in such a liquidation—to that number has been added the redemption—aggregate redemption price of the Christiana 7 percent preferred stock of $12,780,000. So that in this constructed figure, adding those two numbers together, one derives a figure of $2,241,000,000, and it is that figure that is related to the 2,307,000,000 as the aggregate adjusted net asset value of Christiana on the earlier page entitled "Merger."

Q. That is the page preceding the 333 liquidation?

A. Yes, sir.

Q. During the course of your examination with respect to the 333 liquidation reference was made to whether the necessary calculation had been made to determine what the cost of a 333 liquidation would be. Do you recall that examination?

A. Yes, sir.

Q. In answering that question did you mean to leave the

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impression that it was simply a matter of putting some numbers together and putting them into a computer to find out what the cost of a 333 liquidation would be?

A. No, sir. I meant to leave the impression, which I believe are the facts, that to determine Christiana's aggregate accumulated earnings and profits requires a complex calculation and a determination of the value of some of the securities Christiana holds; that it is this complexity which has resulted in—that resulted in being unable to compute that figure at that time.

Q. Are you aware that there are in addition to calculation problems legal questions which stand in the way of a precise 333 liquidation?

A. Yes, sir. I have been informed that there are some legal questions, yes, sir.

Q. Were you informed at the time you were advised with respect to the non-feasibility at this time of a 333 liquidation that there were legal questions?

A. If I may refer to the letter of Dechert Price and Rhoads on July 8th, on page 2 of that letter, sir—

Q. Is that July 8th, or is it the attachment which is July 5th?

A. I am sorry. It is the attachment which accompanies the letter of July 8th.

Q. Yes.

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A. The statement is made that a number of legal questions affecting the computation of earnings and profits were discussed.

Q. And would you read on there.

A. And it has become apparent that it will not be possible to agree upon an earnings and profits figure for Christiana. Would you like me to continue, sir? Furthermore, if all the legal questions discussed were resolved against Christiana, the result would be an earnings and profits figure vastly in excess of $85.8 million.

Q. So it isn't a matter simply of making calculations, but there are legal questions to be resolved.

A. That's correct, sir.

Q. I direct your attention for a moment to the discussion you had with Division Counsel about the Delaware-Christiana transaction. What was the net asset value used in that transaction? Net asset value of what stock are we talking about?

A. Well, we talked, sir, about the net asset value of both stocks, Delaware common stock and Christiana common stock.

Q. What was the net asset value—what was the main asset owned by Delaware?

A. Well, the main asset in computing net asset value—the net asset value was computed in terms of the

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underlying shares of du Pont.

Q. Now, again, what was the main asset of Delaware?

A. My recollection is not that current, sir. Whether it was common stock of Christiana—I believe it was.

Q. Common stock of Christiana.

A. Yes, sir.

Q. Christiana's main asset was common stock of du Pont.

A. Yes, sir.

Q. So we had a situation where Delaware's main asset was common stock of Christiana; Christiana's main asset was common stock of du Pont.

A. Correct.

Q. And what stock was used in determining net asset value for the purpose of the merger?

A. The Christiana common stock. The net asset value—the merger—the proposed merger was in terms of Christiana common stock.

Q. Was there a market for Christiana common stock at that time?

A. Yes, there was, sir. And it was—it reflected, I think the report said, discounts of some 15 to 20 percent from the net asset value.

Q. Now, you spoke in your testimony and I think in your report of a possibility of open-ending. What would the effect of open-ending be as far as the Delaware Corporation

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were concerned if it were to open-end?

A. Delaware would receive shares of Christiana and the other assets held by Delaware .

Q. And if Christiana would open-end what would it receive?

A. Christiana would—well, the Christiana shareholders would receive shares of du Pont and Christiana's other assets.

Q. Now, was it possible for Delaware acting alone to obtain in any way stock of the du Pont Company?

A. No, sir. I attempted to state that a little while ago. But that is true. Delaware could not obtain du Pont stock through the Christiana it held unilaterally.

Q. Are you saying that Christiana's cooperation was necessary before Delaware shareholders could receive du Pont stock?

A. Yes, sir. Christiana's cooperation would have been necessary.

Q. And how could that cooperation have been effected? Mechanically what were the possibilities?

A. Well, either that the two companies open-end simultaneously or that they open-end seriatim, or that a merger take place and then Christiana open-end. Some process of that type.

Q. And reflecting again on this so the record will be

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clear, was there any way that you were aware of that Delaware could acting unilaterally have obtained or have given to its shareholders du Pont stock?

A. Not, sir, other than the du Pont it held directly. I believe it held some du Pont directly.

Q. Yes. Do you know whether that was a relatively small amount of the totals?

A. Yes, sir, I believe it was.

Mr. Gribbon: I have no further questions.

Judge Ullman: Is there anything further?

Mr. Anderson: Yes, your Honor, I had one question.

Judge Ullman: Proceed.

RE-CROSS-EXAMINATION.

By Mr. Anderson:

Q. Referring, Mr. Townsend, to the letter of July 5, 1972, which has been marked as Division Exhibit 2-B, looking at the last sentence in the first paragraph on page 2, which reads "Furthermore, if all the legal questions discussed were resolved against Christiana, the result would be an earnings and profits figure vastly in excess of $85.8 million." Do you take from that, Mr. Townsend, that it is impossible to assume all the legal questions against Christiana and then go ahead and make a calculation as to the tax impact on the Christiana shareholders of a Section 333 liquidation?

A. Sir, I don't believe I know the answer to that

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Judge Ullman: Do you have a witness available, Mr. Gribbon, whom you can start with?

Mr. Gribbon: Yes, I think we do, your Honor. How long did you propose to sit?

Judge Ullman: A half-hour or so.

Mr. Gribbon: The applicant du Pont calls as a witness another Townsend, Edward Townsend.

EDWARD TOWNSEND

was called as a witness and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Would you please state your name for the Reporter.

A. My name is Edward Townsend.

Q. What is your business address?

A. My business address is 20 Exchange Place, New York City.

Q. And what is your occupation?

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A. I am in investment banking with the First Boston Corporation.

Q. What is your position with First Boston?

A. I am a senior vice president, a director, a member of the executive committee, and president of our Canadian subsidiary, First Boston Canada, Limited.

Q. What is the business of First Boston Corporation?

A. First Boston is a leading publicly-owned investment banking firm offering a broad variety of financial services to issuers and institutional investors. These services include underwriting, distributing, and trading a broad range of investment-grade securities, and rendering financial advice.

We have eight domestic offices. We have offices in London, in Zurich, in Tokyo, and in Montreal.

We are one of the largest new issue houses. We are an important factor in the trading of U. S. Government securities, U. S. Agency securities, all types of money

market instruments, corporate bonds and stocks, and in the underwriting and trading and distribution of municipal securities.

Q. How long, Mr. Townsend, have you been——

A. I was just going to finish, if I may.

Q. Excuse me.

A. Excuse me. I am just going to finish. The

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commercial goes on just a little bit longer.

We are members of the New York Stock Exchange and of the principal regional exchanges. We are engaged broadly in rendering financial advice to corporations and governmental entities involving, in particular, financial planning, the design of particular securities, securities issues, the formulation of merger proposals, and the analysis of the financial aspects of mergers.

Finished, sir.

Q. For how long have you been employed by First Boston?

A. Since 1946.

Q. What was your educational and business experience prior to 1946?

A. I was graduated from Yale University in 1934. I studied abroad, in Paris, the School of Political Science in Paris for a year. From 1935 until 1942 I was with the Central Hanover Bank and Trust Company in New York.

I was commissioned in the United States Army in 1942, and served in the Army in Washington as a staff officer directly reporting to the Chief of Ordnance from 1942 until 1946. At that time I joined the First Boston Corporation.

Q. What has been the scope of your work and responsibilities with First Boston?

A. Throughout my time with the firm I have been in what we call our Underwriting Department; some refer to it as

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Corporate Finance. And I have been in that continuously throughout my service with the firm.

During the late 1940's and early 1950's I participated in the Niagara Hudson Holding Company account divestiture and the United Corporation Holding Company account divestiture.

I have been directly connected with and responsible for a number of mergers involving state or federal approval in the bank and insurance company fields. Among the more important of these have been: The Chemical Bank and its merger with the Corn Exchange Bank and Trust Company and New York Trust Company; the merger of the Hanover Bank and Manufacturers Trust Company; and the United Virginia Bankshares, in the reorganization of that bank holding company.

In the insurance field, mergers, some of the more important ones have been—have involved the CNA Financial Corporation, Chubb Corporation, Connecticut General Life Insurance Company, Crum and Forster, Hartford Fire Insurance Company, Home Insurance Company, Reliance Insurance Company, Springfield Insurance Company, Travelers Insurance Company, United States Fidelity and Guaranty Company.

In the underwriting of new issues I have been closely involved with a number of issues for such issuers as the World Bank, First National City Bank, and the Boeing Company.

In the underwriting of secondary offerings I have been closely involved with stock issues of Ford Motor, Alcan

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Aluminium, M. A. Hanna, KLM Royal Dutch Airlines, and International Harvester, among others.

Q. Did I understand you to say that First Boston is a publicly-owned company?

A. Yes, sir.

Q. Approximately how many shareholders does it have?

A. Approximately 7500.

Q. Does First Boston have any stock interest or any affiliation with either the du Pont Company or Christiana?

A. Quite insignificant stockholdings, and no cross directors or anything of that kind.

Q. Has First Boston ever advised du Pont or Christiana on any occasion previous to the one in which we are now concerned?

A. No, sir.

Q. First Boston was asked to advise du Pont as to the terms upon which a merger with Christiana might be effected; is that true?

A. Yes, sir.

Q. By whom were such requests made?

A. By the negotiating committee appointed by the du Pont board.

Q. Was that request made in writing?

A. Yes, it was.

Q. What did you understand to be the nature of your

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assignment?

A. We were asked to recommend a range of merger exchange ratios that would be fair and reasonable to both companies, both du Pont and Christiana, and the shareholders of those two companies, and that would not involve overreaching.

Mr. Gribbon: I ask that there be marked as du Pont Exhibit 1 a communication dated June 6, 1972, from the Special Committee of the Board of Directors of du Pont to First Boston Corporation.

Judge Ullman: Would the Reporter please read that back to me.

(Record read)

Judge Ullman: Off the record.

(Discussion off the record)

Judge Ullman: Mark du Pont Exhibit 1.

(du Pont Exhibit 1 was marked for identification)

By Mr. Gribbon:

Q. Is du Pont Exhibit 1, Mr. Townsend, the letter from the negotiating committee engaging First Boston in this matter?

A. Yes, it is, Mr. Gribbon.

Mr. Gribbon: I ask that that exhibit be received in evidence.

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Judge Ullman: Any objection? Received.

(du Pont Exhibit No. 1 was received into evidence)

By Mr. Gribbon:

Q. Were you aware, sir, that the terms of the merger would be subject to approval by the Securities and Exchange Commission?

A. Yes, sir, I was.

Q. From whom did you receive that information?

A. Well, I think the letter of appointment spoke of that. Yes. The letter of appointment spoke of a Section 17 proceeding.

Q. What information did you obtain from du Pont in responding to this assignment?

A. They gave us a number of corporate documents and financial reports covering a five-year period for both du Pont and Christiana.

Q. Did you have any consultation with du Pont personnel?

A. Yes, we had a number of meetings with officers of the duPont Company, with the negotiating committee, and with du Pont's counsel.

Q. Were you aware that other investment banking firms were advising on this matter?

A. Yes, sir, we were so advised.

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Q. Did you consult with such other firms in preparing your analysis and recommendation?

A. No, sir. There was no such consultation with the other advisors.

Q. When did you first meet with the other advisors?

A. A meeting was planned by du Pont officers with Mr. Vincent Manno, who had been asked to appraise the newspaper property, and it seemed advisable to du Pont that the three firms meet jointly with Mr. Manno and consider his presentation. That was the first occasion, and really the only occasion until we met in Wilmington on June the 30th that we had any meeting or consultation or conversation of any kind with the other firms.

Q. In connection with the meeting with Mr. Manno, was there any discussion of any matter other than the valuation of the newspaper?

A. No, sir, there was not. As a matter of fact, all the conversation at that meeting was really between Mr. Manno and others in the room rather than among the advisors.

Q. Were you asked to consider the possible advantages and disadvantages to du Pont of a merger?

A. Well, we were given by the du Pont officials the advantages that they saw to a merger with Christiana.

Q. Were you asked to advise them in the first instance

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whether a merger would be advisable?

A. No, we were not, sir.

Q. What did you understand to be the advantages and disadvantages of the merger so far as du Pont was concerned?

A. Well, the principal advantages that they cited to us were the dispersion of the 28-percent block of du Pont stock held by Christiana, and secondly the termination of the affiliation with Christiana under the Investment Company Act of 1940 which had imposed some considerable administrative burden on du Pont in the operation of its day-to-day business.

Q. Did you see any disadvantages to du Pont in the merger?

A. No. We went to some pains to ascertain whether there were any disadvantages, and we didn't discover any. And as a matter of fact, we after careful consideration decided that the two principal advantages that they had cited to us were in fact very real advantages to our way of thinking.

Q. Why did you consider the dispersion of this 28-percent block of stock an advantage to du Pont?

A. Well, it is commonly considered an advantage to have a block of any such size dispersed. We were not

aware of any ill effects of the existence of that block historically, but looking to the future, the future is uncertain, and while we were under the impression it had been a benevolent

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influence over many years, the concentration of that block, things might change, and it seemed farsighted to us on the part of the management of du Pont to take steps which were otherwise not unfavorable to du Pont and would effectuate the dispersion of that block.

Q. Were your recommendations in response to this letter of engagement set forth in written form?

A. Yes, sir. We delivered an opinion letter under date of July 6th, I believe.

Q. And were there exhibits and schedules attached to that letter?

A. Yes, sir. We attached a study, a supporting study.

Mr. Gribbon: I should like to ask that there be marked for identification as du Pont Exhibit 4 a letter from First Boston dated July 6, 1972, to Messrs. McCoy and Shapiro, and as Exhibit 4-A a series of schedules captioned "Study of Proposed Merger of Christiana Securities Company Into E. I. du Pont de Nemours and Company, July 6, 1972."

Judge Ullman: Off the record.

(Discussion off the record)

Judge Ullman: Let the record indicate that the letter of July 6, 1972, and the schedules attached to it have been marked as one exhibit, du Pont Exhibit No. 4 for identification.

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(du Pont Exhibit No. 4 was marked for identification)

By Mr. Gribbon:

Q. Does the document that has been marked as Exhibit 4 constitute the written report and attached schedules that you submitted to the du Pont negotiating Committee?

A. I am sorry, I guess I didn't get that. I thought you were addressing his Honor.

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Q. No. Does the document marked as Exhibit 4 constitute the report and attached schedules that you submitted to the du Pont negotiating committee?

A. Yes, sir, that is correct. Yes.

Q. Had you met with the du Pont negotiating committee prior to the date of the submission of this report of July 6?

A. Yes, sir, we had.

Q. What was the date of that meeting?

A. We met in Wilmington with the committee on June 29th, I believe—yes. The evening of June 29th.

Q. Did you advise the committee orally as to the results of your study?

A. Yes, sir.

Q. Did you after July 6 submit an opinion to the negotiating committee with respect to the fairness and reasonableness of the terms that had been arrived at by the negotiators for du Pont and Christiana?

A. Yes, sir, we did that by letter dated July 7th.

Mr. Gribbon: I ask that there be marked as du Pont Exhibit 4-A, a letter from First Boston dated July 7, 1972, to Messrs. McCoy and Shapiro, a two-page letter.

(du Pont Exhibit 4-A was marked for identification.)

By Mr. Gribbon:

Q. Does du Pont Exhibit 4-A express the opinion of

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First Boston as to the fairness and reasonableness of the terms that had been arrived at by the negotiators?

A. Yes, sir, it does.

Q. What was that opinion?

A. That we were completely in accord with the terms that had been negotiated.

Q. What were the terms that you had recommended to the du Pont negotiators as being fair and reasonable in this proposed merger of du Pont and Christiana?

A. We recommended a range of exchange ratios for Christiana common, a range running from 1.108 shares of du Pont to 1.139 shares of du Pont, as well as a recommendation as to the 7 percent preferred of Christiana with respect to which we recommended a ratio decimal 705, which is the equivalent of $120 per share to those holders of the 7 percent preferred of Christiana.

Q. What was the basis for the recommended exchange ratio that you have just described? How did you arrive——

A. As we studied the proposed transaction, it seemed to us that in essence it was a swapping of du Pont common shares for identical common shares held by Christiana. So what would be involved would be the issuance of shares and the acquisition and retirement of other du Pont shares. So it seemed to us that that was quite a straightforward proposition. And studying beyond that, our central concern

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was that the du Pont Company not suffer any adverse effect from this proposed merger, either in business terms or in financial terms.

Q. And how did you go about concluding that the ratio should be in the range of 1.108 to 1.139?

A. Well, in our insistence with ourselves that there be no possible adverse financial effect on du Pont, and given the fact or opinion that the business advantages to which I have alluded were in a sense imponderables, repsented sound corporate planning from our standpoint on the part of du Pont but difficult to quantify—and as I said, we saw no disadvantages, so our first objective was to make a pro forma calculation that would result in no adverse financial effect on du Pont. And we did that in terms of earnings per share for the common stock of du Pont.

And having reached that point, we thought that that might be quite a fine point that we had worked out with our computers and it might not be all that self-evident to the rest of the world that might be balancing on the head of a pin. So we thought the only way, really, to assure ourselves and the world that there was no adverse financial effect was to build in an affirmative gain for du Pont, which we did in terms of earnings per share. And we thought that would provide a visible, tangible inducement to du Pont common shareholders to take affirmative action in sending in their

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proxies and, when the time came, to approve the merger. And in our judgment, a proper inducement of the nature and character that I have been attempting to describe would be in the range of 8 cents per share to 2 cents per

share increase in the pro forma earnings of du Pont common stock.

And those increases in the pro forma earnings of du Pont common stock—that range of 8 cents to 2 cents relates to the range of merger exchange ratios that I mentioned before of 1.108 and 1.139. The 8 cents goes with the 1.108 and the 2 cents with the 1.139.

That was our approach, sir.

Q. Were you aware, Mr. Townsend, that there were significant benefits flowing to the Christiana shareholders as the result of this merger?

A. Yes. That was sort of immediately apparent as soon as we heard of the proposed transaction.

Q. And in your view was du Pont entitled to share in those benefits that would accrue to the Christiana shareholders?

A. No, we didn't think that was the proper way to look at it, and did not look at it in that light, no, sir.

Q. What is the basis of that view that you have expressed?

A. Well, if I understand your question, and if I may be a little repetitious, we saw the essence of this transaction

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to be an exchange of du Pont common shares for other identical du Pont common shares. To us this was a little like changing ten one-dollar bills for a ten-dollar bill, but somebody has to go to some trouble, and shareholders have to be appealed to in a proxy statement, and their vote is desirable if not indispensable. And in order to induce them to approve the merger we thought that there should be a demonstrable—small, modest, but demonstrable financial gain. In practical terms, a proxy-soliciting organization, for example, must have some material to work with in call-

ing stockholders and urging them to send in their proxies. And earnings per share increase is something that salesmen as well as proxy solicitors understand quite well, and most shareholders do. And that seemed to us a range of reward for taking the trouble.

Q. Well, in view of the benefits flowing to the Christiana shareholders, was it your opinion that nonetheless it would be unfair and unreasonable for du Pont to attempt to exact more than about an 8 cent a share increase in earnings as the price for this merger?

A. Yes, sir.

Q. Why did you feel that the Christiana shareholders should not be called upon to give up more than that?

A. Well, as a practical matter, negotiators have to have credibility. And I think we had to bear a responsibility in making recommendations to the negotiating committee of the

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du Pont Company that would give them that credibility at the negotiating table. And in our judgment it would have been unreasonable for them to propose an offer that went further than the top end of our range, the 8-cent pro forma increase in common earnings.

Q. Were you under the impression that Christiana was under any compulsion to enter into this merger?

A. No. As far as I know they were under no duress of any kind. And they initiated the discussions and apparently asked that the matter be explored, and everybody did explore it conscientiously. But they were quite free to walk away from the transaction if they didn't get acceptable terms to them.

Q. Were you aware of any basis on which Christiana might have put the du Pont shares in the hands of its shareholders other than through a merger?

A. No, sir. Again, if I follow the question—and I have listened to the testimony today—if you are referring to the possibility of a so-called 333 liquidation, we were aware at the early stages that such a possibility was being considered or was available to Christiana, might be available to Christiana. We didn't pay any particular attention to it.

We tried to keep abreast of the calculations which were flying around between ourselves and counsel and all as

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to what we might be able to assume was the liquidating value of Christiana. But to us the only significance it would have had was if it had resulted—or if it might have resulted in more than we were prepared to have du Pont recommend in merger, then du Pont would have been, you know, wasting its time pursuing the merger discussions and we would have said no sense going to any more trouble, call it all off, which is only to say that the merger terms would obviously have to be more attractive than the liquidation terms. But other than that, we didn't pay any particular attention to the liquidation calculations, and learned at the same moment, I guess, as everyone else that the idea was being abandoned anyway for reasons that have been gone into here this afternoon.

Q. Did that alter your view in any way as to the range of terms that would be fair and reasonable?

A. No, sir.

Q. Did you obtain in the course of your examination of this problem legal advice as to the interpretations that had been placed upon Section 17 of the Investment Company Act?

A. Yes, sir. We were supplied by du Pont's counsel with such a memorandum.

Q. And what weight did you give to that advice?

A. Well, with all due respect to learned counsel and to the Commission, we didn't pay much of any attention to it,

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sir.

Q. What do you mean by that?

A. Well, those were different facts, different cases, and we didn't think it worth our while to spin theories as to how they might all be distinguished.

To put it another way, we thought the precedents would have to bend to the facts, not the reverse. And we felt quite capable of coming up with a judgment as to fair terms and, you know, if the precedents didn't fit, that was too bad for the precedents.

It is true, of course, that had we been—had there been too great a variance from our recommendation in what counsel thought the precedents—or interpreted as the precedents for us, I suppose we would have re-examined our approach to see if we found any fault with it and, you know, if we hadn't bridged the thing I suppose we would have told our client, the du Pont Company, that we seem to have come up with something that was quite far from what their counsel thought possible and we would have withdrawn from the case or whatever, or advised du Pont to give up the whole thing; that, you know, the precedents were too silly or harsh or something to fuss with any longer.

Q. Did any such variance between your views as to fairness and reasonableness and what appeared in the precedents come about?

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A. I am sorry. I didn't get that.

Q. You spoke of if there had been a variance between the way you came out—

A. Oh.

Q. Was there such a variance?

A. Well, I guess there was. We just treated it as kind of a fall-out of our figures and at the end of our report we did add a little thing we called an addendum to the report that sort of related our recommendations to this other point of view, working from net asset values. And I guess in that addendum I think we used a slightly different asset value calculation than others. It is kind of a fine point. But our range on that basis was kind of 1½ percent to about 4 percent, I think.

Judge Ullman: I think this is a good point at which we can suspend for the hearing. We will be at recess until 10:00 tomorrow morning.

(Whereupon, at 4:50 p.m., the hearing was recessed, to reconvene the following morning, Wednesday, February 7, 1973, at 10:00 a.m.)

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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

File No. 3-3928

—

In the Matter of:
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

—

Hearing Room 776
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C.

Wednesday, February 6, 1973

Hearing in the above-entitled matter came on for further hearing, pursuant to adjournment, at 10:00 a.m.,

BEFORE:

SIDNEY ULLMAN, Administrative Law Judge.

APPEARANCES:

(As heretofore noted)

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PROCEEDINGS.

Judge Ullman: Mr. Gribbon?

Mr. Gribbon: Yes, sir.

EDWARD TOWNSEND

the witness on the stand at the time of adjournment, resumed the witness stand, and upon examination testified further as follows:

DIRECT EXAMINATION (Resumed).

By Mr. Gribbon:

Q. Mr. Townsend, you recall that yesterday afternoon you testified that your firm's advice to du Pont was that it would be fair and reasonable for the merger to be consummated on a basis that would increase earnings to du Pont shareholders by something in the range of 2 cents to 9 cents a share. Is that correct?

A. Yes, sir.

Q. And that you developed a method to reflect that range of earnings in exchange ratios for du Pont shares for Christiana shares which came out in the range of 1.108 to 1.139.

A. Yes.

Q. Now, would you explain for us the method by which you developed those exchange ratios on the assumption that the earnings of du Pont were to be increased in the range of 2 to 8 cents a share.

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Perhaps you would do that by reference to the report you prepared, which has been previously marked as du Pont Exhibit 4.

A. Yes. If I may pick up the thread of the discussion yesterday, I did refer to our recommended exchange ratios, a range from 1.108 to 1.139, and related that range of merger ratios to pro forma increases in du Pont common earnings in the range of 8 cents to 2 cents. And I might further have related it to a pro forma reduction in dividend

requirement of du Pont ranging from 1-million-9 to $85,000, corresponding to the 8 cents and the 2 cents in the range.

If I may take you through our figures and try to do it as clearly as possible, our starting point was to calculate the earnings that we were protecting. To do this, we took the latest earnings available for common, and those were the earnings for the 12 months ended March 31, 1972. We then divided those earnings, which were 372 millions of dollars, by the number of shares outstanding at May 31, 1972, which were 47,445,810. This produces what might be referred to as a break-even earnings of $7.84.

Q. That is per du Pont share? $7.85 per du Pont share?

A. Per du Pont share. These were not the earnings as reported by du Pont because du Pont used an average number of shares outstanding, and as I pointed out, we used the latest

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figure available to us, the shares outstanding at May 31, 1972.

Our next step was to—well, I should say that we then prospectively increased those earnings in the range of 8 cents to 2 cents, or from $7.92 to $7.86.

Our next step was to adjust the earnings of du Pont on a pro forma basis to reflect the merger.

Q. Is that adjustment shown in one of the schedules in your Exhibit 4?

A. Yes. That is the last page. It is designated 3-A of Schedule 2 of our study.

You will see that the total adjustment in earnings on that schedule is $877,000. That was arrived at by eliminating the dividend paid by du Pont on its 4½-million-dollar preferred stock to Christiana because pro forma there would be no such dividend requirement.

We assumed the sale of the 3-percent interest in the Wilmington Trust. We allowed for a selling cost, and we calculated a capital gains tax on the profit on the sale of that 3-percent holding in Wilmington Trust.

We assumed a sale of the News-Journal property at the appraised value, arrived at by Mr. Manno, and we calculated a capital gains tax on that assumed sale.

We also deducted a million and a half dollars from the cash to be received from Christiana as the estimated

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expenses of merger, and we deducted from that cash an additional million dollars estimated cost of pursuing the federal tax claim.

On the net cash and the assets to be converted into cash, as I have just described, we assumed a 7-percent return before tax and a 3.64 percent return after tax.

So those adjustments resulted in a pro forma earnings available for common of du Pont of $372,877,000.

Q. That would be an increase of $877,000, is that correct?

A. Yes, sir.

So we now have two of the three elements necessary to arrive at our result. We have an adjusted earnings figure, and we have three in our case, in the case of our study—three assumed earnings-per-share figures pro forma for the merger. So dividing one by the other gives us the number of shares for a given earnings level per-share, the number of shares of du Pont to be oustanding. And that figure comes out to be 47 million—excuse me. I am doing this for the middle of our range. It comes out—

Q. Let me ask you, Mr. Townsend, which of your charts are you now referring to in Exhibit 4?

A. Well, it is page 3 of Schedule 3. No, I guess it doesn't have a page number. It is the second page of Schedule 3.

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Q. It is the fold-out?

A. It is the fold-out sheet.

Q. Yes. And I note there are three sets of calculations there, numbered at the top I, II and III.

A. Yes. I just want to take you through one other thing first, if I may, Mr. Gribbon. And then I will relate it to the page you just referred to.

It results in there being on this calculation 47,254,218 shares of du Pont common stock outstanding. From that we subtract the 34,028,690 shares owned by du Pont shareholders other than Christiana. And that leaves 13,225,528 shares available for the Christiana common and preferred holders.

We then subtract the 75,082 shares that under our proposal would be given the 7-percent preferred shareholders of Christiana, leaving 13,150,446 shares of common available for exchange in the merger for the common shares of Christiana, which number 11,710,103. And that division produces an exchange ratio of 1.123.

Q. Do I understand that is 1.123 shares of du Pont for each common share of Christiana?

A. Yes, sir.

Q. Now, under what assumption as to earnings increase have you been talking?

A. Well, that happens to be the mid-point of our range

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of 8 cents and 2 cents. It happens to be five cents. And that will be more apparent, I think, if I take you to that fold-out sheet to which I referred a moment ago. It is a rather complicated page, and there are a good many figures on it. But I would like just to call attention to several of the figures which I think will clarify how we arrived at our recommended range.

If you look down the left column—perhaps I should start differently.

The I, II and III at the top embrace our range—I is a ratio of 1.108, II is a ratio of 1.123, and the third alternative is the other end of our range, 1.139.

Now, if you go down the left column of captions, well down towards the end you will see a caption "Earnings Per Share." It says LTM—that is latest twelve months, to 3/31/72. And if you carry your eye to the right you will see a figure—under a caption a little further up "Before Merger" you will see a figure of $7.84. That is the base figure that we are protecting that I referred to at the outset. If you go then to the right under the II caption in the middle of the page on the same line as the $7.84 that I just referred to you will see a figure of $7.89. That is the base figure with a 5-cent addition, a 5-cent assumed increase in earnings per share. And if you look still to the right of that you will see that that represents an increase——

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pro forma increase in earnings per share of du Pont of .6 percent.

If you then carry your eye up that column under II, you will arrive at the sub-caption "After Merger." Under that caption you will see the aggregate shares to be out-

standing under this alternative. You will see the figures of 34,028,690. Those are the shares for du Pont common shareholders other than Christiana.

The next figure 13,225,528, the shares available for Christiana common and 7-percent preferred. That figure includes 75,082 shares for Christiana 7-percent preferred. And the total to be outstanding of 47,254,218.

Q. Stop on that figure a minute, Mr. Townsend. How did you derive the figure of 47,254,218?

A. Well, that was the division of $7.89 into our estimated pro forma earnings.

Q. Which were——

A. It produces that number of shares.

Q. And you took that as the maximum number of shares of du Pont to be outstanding after merger?

A. Yes, sir.

Now, that—I am sorry this is so complicated. But if you will carry your eye to the left of the 47,254,218 figure, you will find a figure before merger, the aggregate shares of common of du Pont outstanding, 47,445,810. The

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difference between those two figures is 191,592 shares, which is the reduced number of shares of du Pont to be outstanding pro forma for the merger under this plan. That is to say that du Pont will be issuing fewer shares than it acquires and retires.

Now, another effect of that, as I again mentioned earlier, is a reduction in the dividend requirement of du Pont, a cash saving.

If you will look below the figures to which I called your attention, the after merger column, under II, and carry your eye down to a side caption "New Dividend Payout," and you will see some figures there, you will see a figure of 66,128,000, which is the pro forma dividend

requirement to former Christiana shareholders. The figure below that of 67,159,000 is the dividend payout pre-merger to the common shareholders of Christiana and Christiana's holding of $4½ million preferred of du Pont.

So the saving that I referred to is the next figure. It is $1,031,000.

Q. What is that saving?

A. I beg your pardon?

Q. What is that saving?

A. It is a cash saving.

Q. Cash saving in dividend requirements?

A. Yes, sir. And you will see on that line, just to tie

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in the figures I have been referring to—you will see laterally on that line, I have just referred to the 1,031,000. That is in the mid-point of our range. If you will look to the left you will see that if there were to be an 8-cent pro forma increase in per-share earnings of du Pont, the cash dividend—the saving in cash in dividend requirement would be $1,910,000; and to the extreme right, a figure of $85,000. That is on a 2-cent assumed increase in pro forma earnings.

Now, one of the things I said yesterday, and if I may I will repeat, is that we felt strongly that there should be no adverse effect, financial or otherwise, but in this context financial effect on du Pont, and one of the things we had in mind was that there should be no worse than a break-even on the dividend payout requirement.

Q. And your judgment was that the increase in earnings should be within the range of 2 cents to 8 cents a share. Is that correct?

A. Yes, sir, it is.

Q. Now, column II reflects the calculations that support an increase of 5 cents a share. Is that correct?

A. That's correct, sir.

Q. And that results in an exchange ratio as set forth in the top of 1.123?

A. Yes, sir.

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Q. And is that the exchange ratio that ultimately was adopted?

A. Yes. There is a little happenstance involved. The negotiating committees were using slightly different numbers, and prices as of different dates, and it is perhaps happenstance that it comes out to precisely this arithmetic figure that I have here. But it was the mid-point of our range, yes, sir.

Q. Do you recall in the testimony taken yesterday from Mr. Townsend of Morgan Stanley some reference was made to earnings increases of 3 and 4 cents a share?

A. Yes, sir. There can be——

Q. How do you account for——

A. There can be some confusion. The reasons are that—or the reason is that the calculations are all made slightly differently. I think the du Pont Company did use or used figures for 1971 rather than our figure of twelve months to March 31, 1972. I think they did not adjust the earnings as we did on their pro forma calculations. And slight differences in the way the figures were put together. But no substantive differences.

Q. Those differences don't change your basic opinion that the range should be in the area of 2 cents to 8 cents a share?

A. That is my view, yes, sir.

Q. Have you anything further that you feel is

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necessary to clarify this exhibit, Mr. Townsend?

A. No. If you have some further questions, I will be glad to respond to them. But I think I have pointed out the significant items on the page here.

Q. Now, would this increase in du Pont earnings within the range of 2 to 8 cents a share in your opinion be a sharing of the benefits to Christiana that would flow from this merger?

A. No, sir, we didn't think along those lines. And we would have thought it quite inappropriate to think in terms of sharing. As I have attempted to explain, it seemed to us that this transaction might very well be attractive to du Pont Company on a break-even basis. It is our view that the proposed merger is a very constructive proposal, that it makes very good sense all around, and it is very much in the interests of the du Pont Company.

However, it was our judgment that knowing there would have to be a shareholders meeting of du Pont, it seemed to us that it was important to add an element, as I said yesterday, I think, build in a modest but demonstrable gain to the du Pont shareholders so that when you approach them for their proxies a concrete argument could be given to them as to why they should trouble to read the proxy and send in their proxy.

Q. In your opinion do the merger terms as finally

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arrived at, which are within the range of your estimate—are they fair and reasonable to both companies?

A. I believe so, sir, yes. I do believe so.

Q. In your opinion do they represent overreaching on the part of either company?

A. No, they do not in my opinion.

Q. In arriving at your advice to the du Pont Company what assumptions, if any, did you make as to the availability of alternative means by which Christiana might get

its du Pont shares into the hands of the Christiana shareholders?

A. We didn't spend very much time worrying our heads about that. The two parties were proposing to merge and we were honored to be asked by the du Pont Company to advise with them on the terms of the merger. And as I think I mentioned yesterday, had anybody produced a calculation that Christiana could liquidate more advantageously than in our judgment du Pont could—more than du Pont could reasonably pay them, as I think I said yesterday, I would have advised the du Pont Company to, you know, cease all effort and expense over the merger.

On the other hand, I had no reason to suppose that any such attractive liquidation possibilities were available to Christiana.

No, I saw Christiana as a continuing enterprise. It has been on the scene since I guess 1915 and done rather well,

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and they are under no pressure to—as far as I was aware, to liquidate or merge or do anything else. They did think there might be advantages to them in merging with du Pont, and I think there certainly are great attractions to them merging into du Pont. But they could certainly have walked away from the transaction, from the negotiations if they hadn't received a fair proposal from the du Pont side.

Q. You were aware at all times that this transaction had to be subjected to the scrutiny of the Securities and Exchange Commission and meet the tests, the statutory tests of fair, reasonable and not overreaching, were you not?

A. Yes, sir, I was aware of that.

Q. Now, had that not been a requirement and had this been a private transaction in which it was unnecessary to secure any public approval, would your opinion as to the terms or the range of terms that would be fair and reasonable have been any different than those you have expressed here?

A. No, sir, they would not. We saw our responsibility as giving advice to the du Pont negotiating committee, putting them in a position to make a reasonable offer to the Christiana and who had strong credibility in such negotiation. At the same time, quite apart from the statutory requirements, we had to have in mind what might be acceptable to the Christiana negotiators. And as we studied the transaction and our conclusions along these lines, I think had we been

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in the shoes of the Christiana negotiators we might very well have argued for a break-even earnings picture pro forma for the du Pont Company. And then I would have expected the du Pont Company to make the kind of argument we have here, that they needed some modest inducement to their shareholders to approve the transaction. And so whichever side of the negotiating table I had been on I think I would have expected the negotiation to be in this range of 8 cents to 2 cents. It is our way of phrasing the range, or using the range. But substantively in this range of 1.108 shares and 1.139 shares perhaps is a better way to put it. I would have expected both negotiating parties to be negotiating in this range.

Q. Do I understand that that judgment you have just expressed is totally without regard to the statutory requirements? It is based on your experience as a banker?

A. Yes, sir.

Q. In your experience in investment banking, Mr. Townsend, is it common practice for parties to a transaction to share on some sort of an equal basis the total benefits that flow from the transaction?

A. No. No, that wouldn't be the pattern at all. It isn't a question of sharing. It is a question of both being satisfied with given terms. Now, they may be quite disproportionate. One may have a very large gain and the

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other a marked dilution. But that is what makes a market. One fellow won't sell for less and the other one is prepared to make some dilution by reason of the prospects of a greater profit down the road. So there is no sharing. There are views on both sides as to the value of what they are contributing to the proposed merger. And those views are likely to differ, and that is why they have negotiations preceding mergers.

Q. In your examination of this matter at the request of du Pont Company did you consider the possible adverse market impact upon the value of du Pont's stock of the consummation of the merger?

A. Yes, sir. We gave that a great deal of thought, and we discussed it on a number of occasions with the du Pont officers and with the negotiating committee. As a matter of fact, the du Pont Company and its counsel called on us in New York in May to inquire whether we would be interested in accepting the assignment that they outlined to us. And we talked for an hour or two and subsequently lunched together, and on that first occasion there was already discussion of the nature of Christiana holdings and whether there was any information available as to whether there would be intended sales—whether there was anything about the merger that related to facilitating sales

or encouraging sales. And the answer was no, that they were not aware of any intentions

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to sell, and those were repeated to us on a number of occasions, or renewed, or brought up-to-date, sort of. There was no substantive information to change that.

Q. I understand from the outset of your study you were taking into account possible market impact.

A. Yes, sir, that is correct.

Q. Do you recall receiving anything in writing from the du Pont side that advised you or asked you to take that factor into account?

A. Well, I think it may have been the same date as our appointment, or the letter of appointment. We were given an opinion—a memorandum from du Pont's counsel outlining matters that they felt should be considered in our study of the problem. And I recall that among the factors listed to be considered was the possible market impact of the proposed merger.

Q. I would like you to look, Mr. Townsend, at an attachment carrying the caption "Appendix A" to what has been received in evidence as Division's Exhibit 1, the attachment being a memorandum of seven pages signed Covington and Burling, dated June 6, 1972, reading "Factors to be considered in report of investment bankers."

A. Yes, I do remember this, yes. Very well.

Q. Is that a copy of the memorandum that you received?

A. Yes, sir, it is.

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Q. And would you point to the portion of that wherein reference is made to study of possible market impact?

A. Yes. Shall I read it, Mr. Gribbon?

Q. Well, just—you acknowledge that you did receive this memorandum and that it did set forth possible market impact as one of the factors to be considered by you?

A. Very clearly stated here, yes, sir.

Q. What page is that?

A. It is on page four.

Q. I note that the copy of the memorandum that you are looking at contains a number of notes. Are those your notes?

A. No, sir, they are not.

Q. You received a clean copy of this memorandum, did you not?

A. Yes, sir, I did.

Q. Do you recall advising the du Pont negotiating committee with respect to the possible market impact of this transaction?

A. Yes, sir. It was discussed at considerable length at a meeting we had with them on June the 29th.

Q. A meeting with Messrs. McCoy and Shapiro?

A. Yes, sir.

Q. And what was the opinion you arrived at and transmitted to them as to the possible market impact of

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this merger?

A. Well, as we studied the transaction we saw no reason to suppose that there would be any selling of any consequence. And it would only have been in the event that we had been told of intentions to sell that we would have taken them into account.

We reasoned that there weren't to be any more shares outstanding pro forma than before. As a matter of fact under our plan there would be fewer shares. Certainly no change in the investment characteristics of the du Pont stock except again under our plan slightly improved earnings, which would be a favorable thing. There were no tax consequences of the proposed merger, no tax selling. And so we saw no reason to suppose that the merger would result in any abnormal amount of selling, and we so advised the company. But as I said once or twice, this was subject to any information they might have of intended sales, and every time we raised the question they reassured us by saying they knew of no intentions to sell.

Q. Did you make inquiries, or did you receive any information with respect to the basis situation of the Christiana shareholders?

A. Yes. Of course we were generally aware and received supporting material from the company as to the holdings of Christiana. We either knew or were informed that

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the Wilmington Trust had something on the order of a 50-percent interest in Christiana; that other stockholders would account for perhaps another 20 percent; that those holding the 20 percent would tend to be large holders, long-time holders so they would have had—just by reason of the length of their holding they would tend to have low-cost shares. And we of course were aware of the effects of the General Motors shares, the divestiture that resulted in tax consequences of reduction of Christiana tax holding costs materially, $60, $70 a share sort of thing.

Q. Is that a reduction in the Christiana corporation's basis?

A. No. In the shareholders'.

Q. The shareholders.

A. The shareholders of Christiana.

So we of course thought of this—the low tax costs as deterrents to sale and nothing about the merger would

change that. The deterrent to sales inherent in the tax laws would still obtain.

Q. Now let me make clear what you were advising when you inquired about knowledge of plans for significant sales of du Pont stock by former Christiana shareholders.

A. Well, we didn't feel we were in a position to query the Christiana shareholders, directors or officers. The du Pont Company was our client, and they are capably

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advised, and we felt quite safe in relying on their judgment and knowledge and information as to whether there were known intentions to sell.

Q. In your experience as a banker, Mr. Townsend, would it be likely that the mere consummation of this merger and the placing of the shares of du Pont formerly owned by Christiana into the hands of some 7500 or 8,000 individuals and institutions have a market impact?

A. No, I see no reason why it should have.

Q. What is your basis for that opinion?

A. Well, there has been some modest amount of trading over the years in Christiana stock, and that would just be translated into trading in du Pont stock. Presumably there is some more or less constant volume of buying and selling for whatever set of reasons. And the market for du Pont on the New York stock exchange is certainly active and vigorous enough to absorb the sort of equivalent volume of Christiana trading that is taking place in the over-the-counter market.

Q. In forming that view that you have just expressed, did you take into account that the Christiana shareholder would after the merger have du Pont shares that had a market value significantly greater than the value of the Christiana shares he held before?

A. Oh, yes. As of the date of our study and the market prices as of that time, it was apparent that there was

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a market appreciation in the transaction for the Christiana holders. That is a transistory thing and more or less the next day or the next week or the next month. But as of any given moment, there was what one might call a greater unrealized appreciation.

Q. Well, in your opinion, would that market appreciation cause—be likely to cause any significant number of former Christiana shareholders to sell their du Pont stock?

A. No. No. Only as the fortunes of the du Pont Company—or as they saw the fortunes of the du Pont Company might change. That would presumably presuade them to buy more or sell or whatever. But they would be looking at—they would be a stockholder pro forma in the merger, they would be a stockholder of the du Pont Company, and one of a number holding 47 million shares. And all of those holders of 47 million shares follow with more or less diligence the fortunes of du Pont and the price of its stock.

Q. Were you aware in making your study of this matter that it was contemplated that certain of the Christiana shareholders would be given what are called registration rights with respect to the du Pont stock they would receive?

A. Well, I guess there were two issues involved there. I was certainly aware that the large holders of Christiana stock, and I would have assumed also the Wilmington Trust and

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the large holders and directors and all those who could be

related as in control of Christiana, presumably presently hold restricted stock in Christiana and would have restricted stock in du Pont after the merger, and having restricted stock would only be able to sell after registration with this Commission. The related question is the registration rights that they might obtain in their negotiation with the du Pont Company, and I would certainly have assumed that they would ask for certain rights and those would be negotiated out by the people who made the trade. Because it would be a nasty and difficult situation if they had to register but didn't have the rights; that would be quite awkward, and they certainly—they and their counsel would have foreseen that difficulty and met it in the negotiation.

Q. Did the fact that it was contemplated that such registration rights would be contracted for influence your judgment as to whether it was likely that significant sales would take place?

A. Oh, no. I think they are quite unrelated.

The Christiana holder would seek the registration rights quite apart from any intention to sell. He would just want to protect himself for an ultimate sale, or for his estate having to sell or, you know, something down the road. But that wouldn't in itself indicate any intention to sell, no, to seek registration rights, no.

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Q. What significance did you attach to the granting of the registration rights insofar as possible sales of the du Pont stock were concerned?

A. Well, that was a comforting thing. I do not know that I needed the comfort, because I would have assumed that those big holders would sell by way of registered offerings. But this just confirmed that that would be so. And the reason that is comforting or reassuring is that it

means that—or tends to indicate very strongly that the distributions will be made in an orderly fashion, and that those who may at some future time decide to sell will presumably, as I say, do so in an orderly manner and obtain the services of a competent investment banking firm or firms, an underwriting group, to handle the rather complicated transaction of a registered offering.

Q. Has your firm, Mr. Townsend, had experience in the management and distribution of substantial blocks of stock in registered secondaries?

A. Yes, sir, we have been active over many years in this field.

Q. Have you prepared some tabulations setting forth experience, not only your own but perhaps that of other companies, in the handling of registered secondary offerings of large blocks of stock?

A. Yes, sir. I have a tabulation before me that is

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illustrative.

Q. Let me ask before you begin there that there be marked as du Pont Exhibit No. 2 a sheaf of statistical tables captioned "Studies Prepared for E. I. du Pont de Nemours and Company, the First Boston Corporation, January 1973."

(du Pont Exhibit No. 2 was marked for identification)

By Mr. Gribbon:

Q. Have you du Pont Exhibit 2, Mr. Townsend?

A. Yes, I have.

Q. Is that the study of secondary offerings that you have just referred to?

A. Yes, sir.

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Q. Was it prepared under your supervision and direction?

A. It was, yes.

Q. Would you look at the second page there and simply describe for us briefly the content of this exhibit.

A. I might better turn to the third page, if I may. Rather than run you through the index let me just take you through the schedules, if I may.

There are really three schedules here, or perhaps it should be called four. The first is in two pages, and they are secondary offerings of industrial corporations of $75 million or more in 1972. There are two pages, and there are six secondaries tabulated. I will come back, if I may, to that.

The next schedule is also in two pages, and this schedule tabulates the 11 largest secondary offerings by industrial corporations during the period 1956 through 1972. And I might say that this started out to be the 10 largest and then the Gulf Oil Corporation secondary came along in December and we added that and that made 11. But no magic otherwise.

The period covered '56—we went back to '56 to pick up the initial offering of Ford Motor stock, an offering by the Ford Foundation.

The next schedule is entitled "History of Secondary Offerings of Gulf Oil Corporation." And the final

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schedule is entitled "History of Secondary Offerings of Ford Motor Company." That really should say Ford Motor Company stock because they weren't offerings, of course, by the company.

Q. I take it that most of these were offerings by stockholders rather than the company, were they not, if not all?

A. These are all secondary offerings. I don't think we have any even combination offerings on any of these pages.

Q. In other words, these are all dispositions by existing stockholders, where the proceeds are not going to the company.

A. That is correct, sir. Yes.

Q. Let me ask you to refer to the first table of the secondary offerings of industrial corporations in 1972 of over $75 million.

A. Yes.

Q. How many of those were managed by First Boston?

A. There were two, Mr. Gribbon. The Gulf Oil Corporation on the first page and the PPG Industries on the second page.

Q. Looking at the Gulf Oil, would you explain the market quotation tabulation down there?

A. Yes. I will just run you down the—we show the date of the offering, characterize it—the caption to the

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left is a little misleading. It says type of offer, new secondary or combined. And these are only secondaries as indicated under each corporate name. It shows the gross proceeds in thousands, 239 million; it shows that the offering consisted of 9,225,000 shares, which represented 4.4 percent of the shares outstanding at that date of Gulf Oil.

Then market price is the price as of a week before the announcement of the offering, or the filing date where filing and announcement are simultaneous.

The announcement date, which could be a week difference between the first and second. The filing date, the filing that is of the registration statement. The price the day prior to the date of the prospectus, the date of

the offering. The price at the time the price was set, the offering date, and then the price one month after the offering. And then the offering price in relation to the last sale.

And then you will see that we have the Dow-Jones average and the Standard and Poor's stock, 425 stock index. And then the prices corresponding to the captions for Gulf Oil at those dates.

Q. Just looking at that last figure, would it be fair to say that this indicates that before you became active with your $239 million offering the market price was 23⅜?

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A. That is correct, yes, sir.

Q. And you sold it at 26?

A. We did, sir.

Q. And that a month after the transaction was completed the stock was selling at 26⅛?

A. That is correct, sir.

Q. Do you know what portion of the—what the relationship was between the amount of this offering and the trading on Gulf stock?

A. This offer was done in December of 1972, but relating it to the trading volume for the entire year 1972, it represented 24 percent of that volume.

Q. 239 million represented 24 percent of the total trading in Gulf during the year?

A. Well, actually that—yes. Actually I think that is a share—percentage of the shares traded for the year.

Q. At what price-earnings ratio was Gulf Oil selling at the time of this secondary?

A. Between 11 and 12 times; in that range.

Q. Is it selling at that now?

A. Approximately the same, yes.

Q. Do you know what price-earnings ratio is that du Pont sells at?

A. Oh, about 20 or 21.

Q. In your judgment, Mr. Townsend, what was the effect

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of this Gulf Oil offering on 12-5-72 upon the market price of Gulf Oil stock?

A. Well, I think you can see from the tabulation—this is sort of a bird's-eye view of it but we lived with it pretty closely and I think you can see that the market took this offering very well. It was in a time that the Dow-Jones—the stock market generally was doing well, but the offering was very well received, and this doesn't seem to have been any impact on the market at all, any unfavorable impact on the market at all.

Q. Would you refer now to the second page of that first schedule, the PPG Industries secondary. What was the market impact of that offering in your judgment?

A. Well, again I think perhaps I oversimplify a little, but—you can lose yourself in idle speculation about these things, but if you compare the market price a week before the announcement of 46¾, you see that a month after the offering the stock was 47⅛. And yet 9.2 percent of the outstanding shares of PPG were sold in that offering. So there doesn't seem to have been any adverse impact as far as I can tell.

Q. At what price-earnings ratio was PPG selling?

A. Somewhere in the 10 to 12 range.

Q. Mr. Townsend, I ask you on the basis of your study of all of the secondary offerings over 75 million in the

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year 1972, what is to be expected as the market impact of a well-managed secondary offering of a substantial block of stock?

A. Well, two things. The record here shows that the market has taken these offerings listed—taken them in stride and they have been very well digested and no observable adverse impact on the market.

Now, when you leave history and talk prospectively, you don't know at any given time what market conditions are going to be like, but we all live on the assumption that we will have periods of good markets, or stable markets, anyway, and our experience indicates that in reasonably favorable markets and with skillful handling the market can absorb very substantial blocks of securities without any adverse impact on the market.

Q. Would you refer to the last of the schedules in du Pont Exhibit No. 2, that detailing the history of secondary offerings of Gulf—I am sorry, it isn't the last. It is the next to the last schedule, that relating to the Gulf Oil offerings.

A. Yes. We showed—excuse me. Were you about to ask a question?

Q. I want to affirm that your firm has managed each of these Gulf Oil offerings, is that correct?

A. Yes, we have, yes.

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Q. Beginning in 1961 through 1972?

A. Yes, sir.

Q. Who were the sellers of this stock?

A. Well, a number of sellers. Generally they are referred to as the Mellon family, but you know that comprises a lot of entities and trusts and foundations and so on. But they are often loosely referred to as Mellon sales.

Q. Was it commonly known in the market that the Mellon family was embarked on a program of disposing of a portion of its Gulf holdings?

A. Well, I wouldn't call it a program, Mr. Gribbon. The record shows—and as far as I know they have no pro-

gram, but the market is aware that they do from time to time decide to sell various of their holdings for whatever set of reasons that they have. And so the market has been aware of this. Whether or not they were taken by surprise in 1961 I don't recall, but, you know, having done it once, one might imagine they would do it again, and in fact they have done it five more times since then.

Q. What about the total volume of the sales of Gulf Oil Corporation stock as reflected in this exhibit?

A. Well, these six offerings total $621 million; it covers a span of 11 years, and represents in the aggregate 17.6 percent of the stock of the Gulf Oil Corporation. And in a more recent period, if you take the three offerings from

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'67 to '72, they totaled 385 million and represent 12.4 percent of the outstanding stock of Gulf—outstanding shares of Gulf.

Q. In your opinion, Mr. Townsend, what has been the impact on the price of Gulf Oil stock of these six substantial secondaries of Gulf that are set forth in your exhibit?

A. I am not aware they have had any adverse impact, and Gulf Oil rocks along pretty well and people continue to buy and sell it without any particular apprehension about offerings. And we take a certain pride in handling one of these as others do in our industry, and great pains are taken with them. An announcement of an offering—under our system this of necessity comes as a shock to the market because our rules and procedures of this Commission and the New York Stock Exchange don't really allow you to leak this out. You have to keep very tight security on the plans until some given moment and then it is announced. It is inherently, therefore, a surprise to the market. And that precedes the organized pub-

lic efforts of the underwriting group to—and that again of necessity—to organize their selling effort.

The underwriters can't begin until the registration has been filed, and it is quite customary for the announcement of the offering to coincide with the filing. So the news of the sudden increase in supply comes before you have had

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a chance to do anything about the demand. So there is usually some little immediate impact of that, while the market wonders what is going to happen and who is going to be selected to handle it and what confidence they have in the people who are going to handle it. And obviously the task of the underwriting group is to find or create a demand equivalent to the new supply. And that is our business.

Q. Have you been generally successful despite these obstacles in finding the buyers?

A. Yes. Always. Knocking wood a little bit on these things. You have to be lucky as well as smart. And we like to think that luck follows the smart people, but.

Q. What was the Gulf Oil stock selling for when the first of these secondaries occurred?

A. It shows a price of 39½.

Q. And what is it selling for now?

A. Well, I can't quite relate them because there has been a stock split in this period.

Q. What was that stock split? Is it the one in the note indicated, two-for-one split?

A. Yes, there was a two-for-one split in September 1968.

Q. Couldn't one compare the—multiply the 26⅝ which is the last price?

A. I think you may be inferring, and if I may say so

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deferentially, erroneously, that there is any relationship between the price at the outset and the price currently in relation to the secondaries that have been offered. I wouldn't—

Q. Would you explain the error of my ways?

Judge Ullman: Briefly, please.

The Witness: I really would like to withdraw that. I didn't mean to say that, but I—

By Mr. Gribbon:

Q. Would you explain what you have in mind there in saying—put it this way: will you draw what comparison you think can be drawn between the price of Gulf at the beginning of these dispositions and the price now?

A. I would be more comfortable with that question, yes. Thank you.

I think you have to look at these in a very limited time frame; otherwise, you get lost in speculation as to the multiplicity of influences at work here. But I think it is simple and reasonable embracing to say if you look at the price at the time of the announcement and the price let's say a month after the offering, by which time hopefully the distribution has been completed, you will see about what effect there has been.

Now, there can be all sorts of extraneous factors. One of our Ford Motor Company offerings, one of the very

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large ones, we brought it on a Tuesday or a Wednesday and President Kennedy was assassinated on a Friday, and

our closing was scheduled for the following Tuesday. And we had some rather anxious moments. And things on that Friday were so enormously complicated that we couldn't get a phone into the floor of the Stock Exchange, or we had to take quite extraordinary measures to try to cope with the upset conditions in the market. But we closed on time and we presented our check at the closing. But obviously the stock was under considerable pressure.

And so there are all sorts of things affect markets, and one can't generalize too much, but when you know of a desire to sell and well-informed people in this field put their minds to it and painstakingly do what has to be done you do all you can do to insure the success of an offering and hope that market conditions will not change abruptly in mid-course. You still have some flexibility, even in what I call mid-course during your offering period. If things were to be too unsettled you can delay or even withdraw and come back another day.

Q. Have you, Mr. Townsend, at our request considered whether the sale of, say, 5 million shares of du Pont stock in registered secondary offerings over the course of the next five years would, in your judgment, have a significant or lasting market impact?

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A. Well, 5 million shares at the present prices would be something on the order of $800 million to $1 billion, and I would be very confident that that could readily be done in a five-year period, perhaps shorter. I don't think it would certainly take any longer.

You really attack it bit by bit. If anyone had such an intention to sell any such volume of stock, what you do, I think, is—you are well advised to start out with a good-size initial offering, maybe 200 or 300 million, perhaps even larger, and then you would be ready to do it again in—oh,

depending on market conditions you might do it again in six months or you might even want 18 months. It would depend on a lot of factors.

And you wouldn't at the outset decide the size of the subsequent offerings. This would all be in the light of conditions at the time. But I would think three or four, at the most five offerings would take care of a block of that magnitude.

Q. And what, in your opinion, would be the effect of such a series of offerings upon the prices that other non-selling du Pont stockholders might be able to look to for their stock? Leaving aside how much could be realized by the selling stockholders, what impact do you think it would have overall on the market value of du Pont stock?

A. I don't think any particularly. If the managing

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underwriter used good judgment and, you know, didn't arrange for a larger sale than he could handle or the market would accept—a very important consideration is the confidence of the market in those who are handling the distribution. What underwriters do, I don't want to get too much into the technical aspects of it, but once having filed, the underwriters are free to solicit orders for the stock. And that is what we in the trade call building the book. And it requires considerable skill and considerable effort and the time of a great many people and the enthusiasm of a great many salesmen. And as that book builds, it is extraordinary how the Street, as we call it, senses how well that book is doing. And if the book is not building well, the Street will know it, and the stock will be under pressure. If the book is going well and the underwriters are doing their job and conditions are reasonably favorable, the Street will take confidence that the distribution is going to be well handled and without any adverse effect on the price of the stock.

Q. I want to make the record perfectly clear on this. Are you aware of any plans to dispose of any significant amount of du Pont stock following this merger?

A. No. Not at all. On the contrary. I have been assured that there are no such known intentions.

Q. And the answers you have given to me have been purely on a hypothetical or assumption basis?

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A. Yes. Yes. I thought you were just asking me hypothetical questions, if someone decided to sell now not anticipated would that frighten other holders of du Pont shares and therefore depress the price of stock. And I endeavored to assure you that that wouldn't necessarily be true at all, that there would be any adverse impact. As a matter of fact, it can be a very constructive thing for a stock and for the company.

I like to think, and I believe this to be so, that there is a far wider understanding today of the Gulf Oil Corporation and its operations and prospects than there was in October of last year, for example; and not because of the passage of time. It is just because of the enormous effort that went into familiarizing investors really world-wide about the affairs of Gulf Oil. And that is in relation to its industry, and there is a much greater knowledge of Gulf perhaps than there has ever been before. And the entire machinery of our industry was harnessed to the effort to acquaint people with that stock and its merits. And so I would say there is probably a great plus to the other shareholders of Gulf, quite apart from the sellers who remain big holders too. But the other shareholders I think have been benefited by that offering.

Q. The company, would it benefit?

A. Oh, yes. Yes. They like to be well-known and

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understood and appreciated.

Q. It has been implied here in questions that large offerings are feasible only with so-called glamour issues, and presumably that du Pont is not a glamour issue. Do you have any comment on that?

A. Du Pont is not a glamour issue, did you say?

Q. Would you regard it as such?

A. I have the highest admiration for it. I would say it is the bluest of the blue. Now, whether blue is glamorous, I like blue.

Mr. Gribbon: I have no further questions.

Judge Ullman: We will be at recess for ten minutes.

(Whereupon, from 11:10 to 11:25 a.m., a recess was taken.)

Judge Ullman: On the record.

Mr. Gribbon, did you have some exhibits that you wanted to offer in evidence?

Mr. Gribbon: Yes, Your Honor. I would like to offer in evidence the du Pont Exhibit 1, 4, 4-A, and 2, which have previously been identified.

Judge Ullman: I believe 1 has already been received.

Mr. Gribbon: I think that is correct.

Judge Ullman: The others are now being offered.

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Is there any objection? They may be received.

(du Pont Exhibits 2, 4, and 4-A were received in evidence.)

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: Yes, Your Honor.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. Townsend, did I understand you to testify that the first contact that your company had from du Pont in connection with this proposed merger was sometime in May of 1972 when their lawyers came up to your firm and discussed the matter?

A. Yes, Mr. Collins. It was late May. The people who came, I can give you later if you like a list of them, but they were officers of the du Pont Company as well as their counsel.

Q. Were you present at this meeting?

A. The first meeting, yes, I was, sir.

Q. Now, at that meeting did you discuss any possible range of valuations as a preliminary estimate on what you thought would be the exchange value?

A. No, we hadn't given the matter any prior thought. The purpose of the call was to discuss with us our availability to serve as an advisor to the du Pont Company,

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Q. Well, now, du Pont shares of stock that represent a controlling interest in a corporation, do they have the same value as shares of stock that represent a minority interest in a corporation, in your opinion?

A. Well, I would rather use the words "potential control." And then I think the answer to you is that it de-

pends on a transaction, on a negotiation, on a sale. And there might be different views of the value of the block; it might be worth more or less than the small hundred-share lot. It would depend.

Just prior to the failure of the Penn Central a large block of Penn Central I don't believe would have brought as much perhaps as a hundred shares. On the other hand, if there are people anxious and capable of acquiring controlling interest in a company, they are often willing to pay a substantial premium on that stock.

Q. You heard Mr. Townsend yesterday—Mr. Charles Townsend yesterday testify that in his opinion the value of stock for merger purposes would be different, or could be different from the value of that same stock for federal income tax or federal estate tax purposes. Did you hear him testify to that?

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A. Yes.

Q. Do you agree with his opinion on that?

A. Yes. If I understand his opinion I do agree that there is a great difference in what you are talking about. If you are talking in one instance of a tax-free exchange of shares and on the other hand of the valuation for tax or other purposes of a block of stock assuming it is to be sold—given that assumption, you know the two cases are quite different. Yes, I do agree with him.

Q. Then you would say that the value of stock can have different values depending upon the purpose for which it is being traded, or the circumstances in which it is being sold?

A. Well, I don't think of a merger as a sale. I don't think it is so construed. In a merger one exchanges shares of one company for shares of another or of a new third company.

Q. Now, as a businessman, and forgetting about the legal technicalities and legal aspects of this proposed merger, would you say that this is simply an acquiring or a buying by the du Pont Company of shares of stock of du Pont in exchange for its own shares?

A. Yes.

Q. That it is simply a buying in?

A. Buying might not be the most accurate word.

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By Mr. Murtaugh:

Q. Let me question your assumption of the net asset value of du Pont shares as being an index of the value of Christiana shares. The net asset value——

A. Excuse me. You lost me already, Mr. Murtaugh.

Q. Excuse me.

A. My concept of net asset value, did you say?

Q. Yes. Net asset value–excuse me. Net asset value of Christiana shares as being an index of its value.

A. Have I said so? I don't think so.

Q. Oh, okay. What is your idea of the value of Christiana shares?

A. What they trade at in the market.

Q. Well, then, we are trading something that is worth, say $140 or something that is worth $160 and we are throwing in–we are giving them $140 and we are throwing in another 25 or so, is that——

A. There is a prospective increase in market value for them from their transaction, yes.

Q. You total that up with half a billion dollars is a fair statement, isn't it?

A. No, I think the testimony yesterday was about $50 million.

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Q. ° ° ° Now, as I understood on direct examination, you said that the question came up and counsel advised that you have no reason to think that–they had no information as to there being any particular volume of selling intentions. Is that correct?

A. I think it was officers of the company rather than th ir counsel in that particular question.

Q. What was it was said on that subject?

A. That they were not aware of intentions to sell on the part of Christiana holders if the merger were consummated.

Q. Did they say they made a study of the matter?

A. Well, they are obviously well informed about the nature of those holdings, and had they–had there been–and I assume they made some inquiries.

Q. Well, now wait. If they made inquiries then they were aware of them.

A. Not of intentions to sell. They were aware of what the situation was.

Q. Yes. So they were aware that there wouldn't be any sales if they made inquiries, or that there would.

A. Let's put it this way: they had not unearthed any information with respect to the intention to sell on the part of any Christiana holder.

Q. Did they indicate they had dug?

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A. You said they dug?

Q. Yes. In regard to the inquiries.

A. They made such inquiries as they felt appropriate, I guess.

Q. Then that is a pure guess on your part?

A. As to what they did, yes, it is.

Q. I think you said this morning that if you believed there would be substantial sales that you might have either done one of two things: recommended no merger or raised your price that you thought would be appropriate to counteract the substantial sales that might affect the market. Would that be a fair statement? I mean of the substance of what you said?

A. It might well have altered our view as to the merger terms had we known of intentions to sell in size, yes.

Q. Didn't you think it was discreet to ask that there be some sort of evidence taken as to this?

A. No, not really. Because I think I would have assumed that had they an intention in the near future to make a sale it might well have had to have been disclosed in the proxy material.

Q. In connection with foundations and charitable institutions and trusts for charity, any sale could be executed without tax loss, isn't that correct? Any tax consequences?

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Q. Well, as a trustee you have 10 million shares of Christiana and maybe a couple million shares of other assets.

A. If I had 10 million shares of Christiana I would have virtually all of them.

Q. I don't mean 10 million. I mean 100,000, we will say, shares of Christiana. And maybe 10 percent other

assets. You have been holding onto the Christiana because presumably you felt that they don't represent intrinsic value of the shares because of the mark-down from the underlying assets. Would that be a probable reason why trustees might hold onto Christiana shares?

A. Basically they would hold on because they are satisfied with their investment.

Q. They would sacrifice the principle of diversification because of the fact that they were holding du Pont shares underpriced; is that correct?

A. No, no. I haven't said they were underpriced. They sold for what they were, the assets and earnings and dividends and so on that Christiana had, and sold on that basis as a separate stock in the market.

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Q. Well, I want to write that down because I want to go into that.

But to pursue this line of thought, would you say that du Pont's Christiana shares were thoroughly—by virtue of the economic circumstances, were thoroughly isolated from the market?

A. Du Pont's Christiana shares?

Q. No, Christiana's du Pont shares. I beg your pardon.

A. Insulated from the market?

Q. Yes.

A. Yes.

Q. And would you say that if they had been on the market the market would be the same, or could you speculate on that?

A. Well, other things being equal it is not going to have any effect at all.

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By Mr. Anderson:

Q. Yes. Do both documents together, even though they were originally separate documents, list everything you had in your possession when you made your recommendation and report?

A. Well, not necessarily. And I don't think it purports to be a complete list. I think this must embrace most of the basic data, but for example, we had the conference with Mr. Vincent Manno, the appraiser of the newspaper property, and we were in possession of quite a lot of other material. And one of our exhibits here, for example, having to do with secondaries, of course, isn't listed here. So I don't think this was prepared to represent a complete list of everything we—all the material we had or referred to.

Q. Mr. Townsend, I don't believe the record is clear at this time as to the number of meetings you had with the applicants or with the other financial advisors. Do you remember the number and the dates on which they were held?

A. Well, with the other advisors, we met on one occasion. I think it must have been the latter part of June. A meeting with Mr. Manno, the appraiser of the newspaper property. A meeting convened by the du Pont Company officials. All three advisors were represented at that meeting, and I am quite sure du Pont's counsel were represented at that meeting.

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Q. What is your present view as to the likelihood of Christiana being able to disappear through liquidation?

A. Well, we understand that currently it is not feasible by reason of tax penalties that it would draw.

Q. Who informed you of that, Mr. Townsend?

A. Well, I think the information actually reached us through du Pont's counsel, but I think probably it originated with the Price-Dechert firm. But I don't recall discussing it directly with Price-Dechert. I think it was with du Pont's counsel.

Q. Looking at No. 5—

A. That would have been on or about June 30th, the time of the general meeting, I think.

Q. Looking at No. 5 in Division Exhibit 10, the last sentence, wherein it is stated "Nor do we see any reason why the du Pont Company, always assuming its interests are properly protected, should not"—excuse me—"should adopt a negotiating position so harsh as in effect to leave Christiana no alternative but to liquidate."

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Q. I believe you testified earlier, Mr. Townsend, that you believe a 5-cent increase in du Pont's earnings is adequate to get the consent of the du Pont shareholders. Is that correct?

A. I do, sir, yes.

Q. I think you would agree that this benefit to du Pont is not being shared in by Christiana. Is that correct?

A. No. This just flows to du Pont.

Q. And when you talk about the impropriety of du Pont sharing in the benefits to be received by Christiana, by that do you mean benefits that Christiana has but which have cost du Pont nothing in cash outlay or other value transferred to Christiana?

A. Yes. They are so to speak extraneous gains, so to speak, in the Christiana side. They are not at the expense of du Pont in any way and are of principal interest to the Christiana shareholders.

Q. And would you reject the notion that—and the assumption that if du Pont had been able to get a larger discount from Christiana's net asset value, the fact that they didn't pursue that is an opportunity gone and thus an

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opportunity lost to du Pont?

A. I am not sure I follow that question. I do reject the notion that they should have gone beyond our range of 8 cents. I would have considered that an unreasonable negotiating posture that would have reduced the credibility of the du Pont negotiating committee, and that it would have represented overreaching.

Q. Is it your opinion, Mr. Townsend, that the du Pont negotiating committee could not have gotten an agreement on a basis that went beyond 8 cents per share benefit to du Pont?

A. Well, I must assume that the Christiana negotiators are informed, skilled negotiators and that they would have looked at the problem much as we did, and that had an offer been made to them outside of our range, that they would have rejected it.

Q. I believe you testified to the effect this morning, Mr. Townsend, that in a merger—any merger, not necessarily this one, merger partners don't always necessarily share equally in the benefits of the merger. Is that correct?

A. Yes. Actually the consequences that flow from most mergers are disparate in the extreme.

Q. Would you characterize the present merger proposal as one of that type?

A. Well, no, I think this is in some respects a simpler set of facts. The dollar figures are all enormous,

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(Discussion off the record)

Judge Ullman: On the record.

I will take official notice of the release, and during the evening recess Division Counsel will verify the number of it as an Investment Company Act release since it appears that it is a release under other acts as well as an accounting series release. When we reconvene in the morning we will designate the number of the release of which I have taken official notice.

Again, off the record.

(Discussion off the record)

Judge Ullman: On the record.

RE-DIRECT EXAMINATION.

By Mr. Gribbon:

Q. You were examined by Division Counsel with respect to the possibility of a 333 liquidation of Christiana. Do you recall that?

A. Yes.

Q. At the time, Mr. Townsend, that you advised the du Pont negotiating committee that in your view the range of exchange ratios of something between 1.108 and 1.139 would be fair and reasonable, were you under the notion that a 333 liquidation was still feasible?

A. No. No, we were led to understand that it was not feasible as of our definitive report on July 6th.

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Q. As of your report to the committee at the meeting on June 30th.

A. Oh, June 30th. No. As of that date we had understood it was a possibility.

Q. Right. Now, did the final notice that the 333 liquidation was not a possibility at that time alter your exchange ratio recommendation in any way?

A. No, sir, it did not.

Mr. Gribbon: That is all, your Honor.

Judge Ullman: If there is nothing further, you are excused, Mr. Townsend.

The Witness: Thank you, your Honor.

(Witness excused)

Judge Ullman: We will be in recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:50 p.m., hearing in the above-entitled matter was adjourned, to reconvene on Thursday, February 8, 1973, at 10:00 a.m.)

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PROCEEDINGS.

Judge Ullman: The hearing will please come to order.

Mr. Anderson has handed to me a copy of the release which we noticed officially yesterday, and the number as he indicated, Investment Company Act Release 5847.

Mr. Gribbon, I believe we are about ready for another witness.

Mr. Gribbon: May I defer to Mr. Broderick.

Judge Ullman: Yes, indeed.

Mr. Broderick: Your Honor, at this point, on behalf of Christiana, we will call Mr. Midgley. Whereupon,

EDWARD MIDGLEY

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Broderick:

Q. Will you please state your name and business address, Mr. Midgley?

A. Edward Midgley, 10 Hanover Square, New York, New York, 10005.

Q. By whom are you employed, Mr. Midgley?

A. Kidder, Peabody and Company.

Q. And what position do you hold with that firm?

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A. I am a vice president, a stockholder, and a director.

Q. How long have you been employed by Kidder, Peabody?

A. Over ten years.

Q. Now, would you briefly describe what position or positions you have held within the firm during that period of time?

A. During that entire period of time I have been active in the corporate finance department of Kidder, and at the present time I am manager of that department.

Q. Would you describe your educational background, please.

A. I graduated from Princeton University in 1958 with a bachelor's degree in economics, and graduated from the Harvard Business School in 1962.

Q. Would you briefly describe the nature of the investment banking functions performed by Kidder, Peabody.

A. Briefly, Kidder, Peabody is a major international investment banking firm that is engaged in the origination and offering of securities in the United States and abroad. We have 35 domestic offices and over 400 salesmen involved in selling securities. We have five offices overseas, in addition to a very active trading operation overseas.

I think possibly the best way to describe our firm is that we are involved in all aspects that are typically

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considered to be parts of the investment banking business with the exception of government securities and commercial paper.

Q. You have indicated that during your employment with Kidder all your time has been spent in the corporate

finance department. Would you describe for us what function or functions are performed in that department.

A. There are four basic categories of functions performed by the corporate finance department of Kidder. The first and the traditional one is the underwriting or public offering of corporate securities. Secondly, we are involved in the private placement of securities for issurers. Thirdly, a great deal of our activity is involved in merger and acquisition work. And fourth is a catch-all category which we consider financial consulting.

Q. And in your capacity as manager of the corporate finance department, do you participate either directly or indirectly in that broad range of activities you have just described?

A. Yes, I do, sir.

Q. Would you explain with respect to your recommendation to Christiana the process by which your firm arrived at that recommendation.

A. Well, it was a very long process. It began in late May when we were asked if we would consider accepting the

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assignment. At that time, after we did agree to accept the assignment, we put together a team, of which I was the head, which principally consisted of three people: Albert H. Gordon, the chairman of our firm and chief executive officer, myself, and an associate, Mike Keehner. At various times we had up to four or five other associates involved in various aspects of finding out what the parameters of the problem that had been presented to us was.

Once we felt we understood the problem, we did a great deal of statistical and analytical work to begin to formulate what the issues or problems in analysis were.

At that point in time we had a major meeting with certain senior members of our corporate finance department who had had many years of experience in similar kinds of transactions, and we reviewed with them the types of assumptions we were making, the scope and extent of our analysis, and indicated the preliminary conclusions that we happened to be reaching.

We also had almost daily contact with Al Gordon through this period and were having the benefit of his thinking and input on our progress.

At various times, when considering certain of the subsidiary issues, we contacted the other departments within our firm that had experience that we deemed to be relevant to the question at hand.

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Q. Mr. Midgley, does Kidder, Peabody or any of its officers have any stock interest in either Christiana or du Pont?

A. The firm does not have any stock interest in either Christiana or du Pont. According to our firm records, there is one Kidder officer who owns 100 shares of Christiana common.

Q. To your knowledge, Mr. Midgley, has any officer of Kidder ever served on the boards of directors of either Christiana or du Pont?

A. No, sir.

Q. Kidder, Peabody was requested by Christiana to assist it and recommend merger terms, was it not?

A. Yes, sir.

Q. Who made that request?

A. The special negotiating committee of the Christiana board of directors.

Mr Broderick: I would ask that this document be marked Christiana Exhibit 1.

(Christiana Exhibit No. 1 was marked for identification)

By Mr. Broderick:

Q. Mr. Midgley, would you identify for the record a one-page document that has been marked Christiana Exhibit 1.

A. This is the letter we received.

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Q. And its date is what, sir?

A. June 6, 1972.

Q. And it is from whom, sir?

A. It is from the special committee of the board of directors of Christiana Securities Company. It is addressed to Kidder, Peabody. And at the bottom it is noted that the assignment discussed therein is accepted by Kidder and signed by our chairman, Mr. Gordon.

Q. Were you aware, Mr. Midgley, that the negotiated terms of this merger would have to be submitted to the Securities and Exchange Commission for their approval?

A. Yes, sir. And we were so informed in this letter.

Q. Did you or your firm review cases involving the interpretation of Section 17 of the Investment Company Act of 1940?

A. Yes, sir. We spent a great deal of time looking at, if I may, Section 17 cases for their assistance in determining what precedents they might be in our analysis, both from the legal point of view in terms of indicating what the Commission had determined in the past was fair and reasonable and not overreaching, but also we were quite concerned with what, if you will, financial precedents there might have been in those other cases, what precedents there might have been in the analysis of the economic factors.

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We were provided by counsel with a memorandum on a number of these Section 17 cases, but we sent one of my associates here in Washington to spend two days to go through the files to try to get the underlying financial advisor's reports in every other instance where they were available. So that we felt that at the time we had rendered our opinion that we had done everything we knew how to do to be aware of every other situation which in any way could be considered comparable, and we had taken note of the positions that people had taken both from the legal, and especially from the financial point of view in those situations.

Q. You say you sent an associate to go through the files. I take it by that you mean the files maintained by the SEC?

A. Yes, sir.

Q. Did you render a report or reports to Christiana containing your recommendation, sir?

A. Yes, sir.

Mr. Broderick: I ask that the large document bearing the date July 7th, to which is attached a number of exhibits, be marked as Christiana Exhibit 2, and the two-page letter dated July 17th be marked as Christiana Exhibit 3.

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(Christiana Exhibits 2 and 3 were marked for identification.)

By Mr. Broderick:

Q. Mr. Midgley, with respect to Christiana Exhibit 2, would you identify that for the record, please?

A. This is a report prepared by Kidder, Peabody dated as of July 7, 1972, which was a report by us to the special committee of the board of Christiana Securities Company concerning a possible merger of that company with the du Pont Company.

Q. Did you participate in the preparation of that report, sir?

A. Yes, sir. I was responsible for it.

Q. Now would you kindly identify for the record Christiana Exhibit 3.

A. Christiana Exhibit 3 a letter from Kidder Peabody signed by our chairman, Mr. Gordon, dated July 17, 1972, addressed to the Board of Directors of Christiana, in which we indicate that we feel—that is the opinion of the firm that the agreed-upon exchange ratio is fair and reasonable to the common and preferred stockholders of Christiana.

Q. In preparing those documents and rendering your recommendations, Mr. Midgley, were your recommendations influenced in any way by any consultations with either

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Morgan Stanley or First Boston?

A. No, sir.

Q. With the exception of your firm's advice to Christiana concerning this particular transaction, has your firm in the past performed any investment banking functions for either Christiana or du Pont?

A. No significant transactions that I am aware of other than participating as an underwriter in certain public distributions of du Pont securities.

Q. With respect to your final recommendation to Christiana concerning a range of ratios which you considered fair and reasonable, would you tell us what that range was?

A. We felt that any offer within the range of plus two percent of net asset value as we defined it to minus three percent of that value—that any deal that was struck within that range would be fair and reasonable to the Christiana holder and would not involve overreaching on the part of either party to the transaction.

Q. And as the testimony has indicated, the agreed-upon exchange ratio fell within your recommended range; is that correct?

A. Yes, sir.

Q. Now, in the course of your analysis and study of this problem did you have any meetings, or did Kidder have

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any meetings with the Christiana special negotiating committee?

A. Yes, sir.

Q. Can you tell us when the first such meeting occurred?

A. The first meeting was on June 13, 1972. Messrs. Gordon, Midgley and Keehner were there representing Kidder, together with our counsel, and the special negotiating committee of Christiana.

At that meeting we outlined to that committee what we had been doing, where we seemed to be coming out. It appeared at that time, although we hadn't reached any—there was still a lot of analysis going on, that it looked like our opinion was going to be that we felt that the answer was net asset value; that although we had been asked specifically in the letter of June 6th to give a range of values, that we felt that the evidence was—that our analysis indicated that net asset value was the best starting point, at least, in the negotiation. And we wanted the committee to be aware early in the process that that might be our position.

Two weeks later, I believe, on June 27th, Mr. Keehner and myself met again with this committee, indicated to them that we had completed our analysis, that it was the firm's opinion that net asset value was the best starting

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point for the negotiation. But we did indicate that we would be prepared to say that certainly any offer falling within the range of plus or minus 1.7 percent would be fair and reasonable and not involve overreaching.

Q. Now, how did you arrive at the figure of plus or minus 1.7 percent at that June 27th meeting?

A. Well, on the minus side we arrived at that because there appeared at that time to be a floor at that point represented by an alternative which has been described as a Section 333 liquidation.

Q. You did attend, I take it, the June 30th meeting at which the other financial advisors were present.

A. Yes, sir.

Q. And at that meeting did you describe or explain the Kidder recommendation to the group?

A. Mr. Gordon and I jointly made that presentation.

Q. And what conclusion or recommendations did you state at the June 30th meeting?

A. Our written report prepared for that meeting took the position that the transaction should be done at net asset value. However, when we were asked what range around that value we could be comfortable with, we expressed orally that we could be comfortable with a plus or minus 1.7-percent range.

Q. Did you subsequent to June 30th meet again with

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the Christiana special negotiating committee?

A. Not by themselves. On July 6th we met with all the outside directors of the Christiana board.

Q. When you say outside directors, do you mean people who are not also directors of du Pont?

A. Yes, sir.

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Q. And what was the purpose of that meeting?

A. The purpose of that meeting was to inform the directors that it was the opinion of the firm that the proposed transaction at a discount of 2½ percent was in our opinion fair and reasonable to the Christiana stockholder and did not involve overreaching on the part of either party.

Q. Would you describe, Mr. Midgley, the advantages or disadvantages of this merger to Christiana?

A. In Exhibit 4 of our report dated July 7th, which I believe is Christiana Exhibit 2.

Q. Christiana Exhibit 2.

A. We summarized in outline form what we perceived to be the principal advantages and disadvantages based, of course, on the assumption at that time of a net asset value exchange with no premium or discount. The principal advantages to Christiana that we saw was, first, that it would enable the Christiana stockholder to realize the underlying value that he already had in terms of the market price of the du Pont shares. In addition, it would result in more current income, more dividend income through the elimination of the Federal tax and certain operating expenses.

Thirdly, the Christiana stockholder would have a much more liquid security from the trading point of view if he were to decide to sell. And that he would now—with the

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du Pont stock he would be able to participate directly in the du Pont Company.

In terms of the disadvantages of the transaction to the Christiana stockholder, we felt that a very important disadvantage was that this what to us was a relatively unique block that represented potential control of the du Pont Company, which in our opinion could probably never be reassembled—that the Christiana stockholder was giving up this unique asset.

Secondly, and this was of concern, we understood, on the part of a number of long-time Christiana holders, that there would be a significant increase in estate tax liabilities resulting from the transaction due to the higher market valuation of the du Pont shares than existed with Christiana shares.

And thirdly, based on the transaction that was finally accepted, it was a disadvantage to the extent of the discount that the Christiana stockholder was giving up the opportunity to later negotiate a better deal or no discount.

Q. Now, with respect to du Pont, Mr. Midgley, will you describe the advantages or disadvantages that you saw?

A. We also thought there were clear, discernible advantages of this transaction to the du Pont Company. That the controlled elimination of this large block was a definite advantage.

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Q. Why is that? You are talking about the controlled dispersion of the 28.3 percent interest?

A. Yes, sir. There were certain other alternatives or certain other courses of action that the Christiana board or stockholders acting alone might have taken at that time or at some future date which could have had an adverse effect on the fortunes of the du Pont Company.

Q. All right. What other advantages, if any, did you discern to the du Pont Company?

A. Well, there was the elimination of the affiliate status under the Investment Company Act of 1940, and there were certain administrative and mechanical problems associated with that that would be eliminated.

We felt a very definite advantage would be that the increased number of shares of du Pont stock that would be in the marketplace would make for an even more liquid market than du Pont enjoyed, and that this could actually have a favorable—or a potentially favorable effect on the market.

And to the extent, of course, that the deal did result in a 2½ percent discount from net asset value, the du Pont stockholder gained a significant, in our opinion—a substantial economic benefit for going into this transaction.

Q. Did you see any significant disadvantages to

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du Pont?

A. No, sir, we did not feel there were any significant disadvantages to du Pont.

Q. In your report, Mr. Midgley, you state that Christiana should be valued on a net asset value basis. Would you explain what you mean by that term? And here I suggest you might want to turn to page 2 of your July 7 report.

A. Well, on page 2 of that—would you like me to read this or——

Q. Just explain it. Or if you feel more comfortable reading it, read it.

A. What we did—and I don't think this is—I think this is just a standard definition of net asset value, was we took all the assets of Christiana and subtracted from those assets any liabilities that Christiana had. Also we subtracted the value of the Christiana preferred at the value that we felt it should be valued at which was the option

redemption value or $120 a share. And then adjusting it for this transaction, we also subtracted one-half of the estimated expenses of this transaction.

In terms of the assets, we did not give any value to the Christiana tax claim because we felt that an alternative method had been developed to give to the Christiana stockholder whatever value was existent in that particular asset.

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Q. Would you explain how you valued the Wilmington News-Journal?

A. We valued, for the purposes of our calculations, the Wilmington Trust Company holding at market value without any discount for blockage or without any recognition of potential capital gains liability.

Q. I had asked you about the Wilmington News-Journal. You told me about the Wilmington Trust Company. My question will be considered to have been modified to have asked you about the Wilmington Trust. Now will you explain how you valued the Wilmington News-Journal?

A. We accepted an independent appraiser's view of the value of that newspaper from which we felt it was appropriate in this case to deduct the capital gains liability that would result from that sale.

We were familiar at the time with the markets of newspaper stocks and valuations, and we felt that the value that the appraiser gave to the paper was reasonable based on this other experience that we had. But it was clearly an acquisition value, the value of this property as an acquisition.

And since the acquisition would result for reasons we understood and the du Pont Company wanting to sell it,

we thought that as long as the Christiana stockholder had the premium involved from the use of the

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acquisition value, that it was appropriate to recognize in this case the capital gains liability that the du Pont Company would recognize when it sold it.

Q. Will you explain, Mr. Midgley, how you arrived at your conclusion that the appropriate valuation method, if you will, was net asset value.

A. Well, this was a long process. When we approach a merger transaction we look at two broad categories of criteria or factors which in our report we have I am afraid glibly called financial and non-financial factors. Non-financial factors would in most mergers be very important to us. We would be concerned about the relative gross of the two firms; we would be concerned about competition, about markets, about research and development, production facilities, a whole raft of business-type of analysis of the two companies.

We concluded in this case, because over 98 percent of the assets of Christiana were in du Pont, that there was really no change in the character of the investment to the Christiana stockholder by shifting from one to the other, and as such, that we did not have to give significant weight to these non-financial factors.

As we shifted to the consideration of financial factors, we first looked at—maybe not first, but earnings and dividends are very important to stockholders. But for

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various accounting and other reasons we did not feel that an analysis of earnings and dividends was helpful in arriving at an exchange ratio in this case.

We looked at book value, and concluded from du Pont's point of view that investors in the du Pont Company have virtually no interest in the book value of du Pont in relation to many other factors, in that the historical cost to Christiana of its assets was just grossly undervalued—the value of the Christiana holding. So we rejected book value as a significant factor to be considered in this transaction.

This left us with market value and net asset value.

Q. In other words, after you had gone through this process, you were left with market value and net asset value?

A. Yes, sir.

Q. As your report indicates, you selected or recommended net asset value? Is that correct?

A. Yes, sir.

Q. Now, would you tell us the specific reasons which led you to that conclusion.

A. There were a number of reasons that led us to the conclusion that the net asset value approach was the appropriate one in this instance. The first reason was that in evaluating closed-end investment companies we typically, and we believe that most financial analysts also, look at net asset value as the principal determinant, or at least

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starting point for determining value.

Second and probably most important to an understanding of our approach to this entire transaction is that we—stripped of certain legal and tax complexities, we viewed this transaction simply as Christiana in a sense liquidating itself and giving what it had and what its stockholders already had to its stockholders. And but for

these legal and tax complications, the assistance to the du Pont Company would not even have been required. But in the real world we did have these legal and tax complexities with which the Christiana stockholder—which he had to face, and therefore, in this transaction it was necessary to enlist the cooperation of the du Pont Company. And we felt that the consideration paid for that cooperation, which has been expressed as $55 million, or to look at it another way, the Christiana stockholders gave back over 166,000 shares of the du Pont stock that they owned plus a newspaper, plus the holdings of the Wilmington Trust. But this conception of what the really economic basis of the transaction was led us very strongly to the position that net asset value was the appropriate criterion for the exchange.

Thirdly, we believe that most, if not all, of the holders of Christiana common and most people who purchased Christiana common perceived of themselves as holding or purchasing the future growth and development of the

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du Pont Company, and as such we thought that was another factor leading us to the net asset value approach.

A fourth reason is that we felt that there were alternative means by which the Christiana stockholder could approximate his net asset value. We mentioned two specific ones in our report: a so-called dividend reinvestment plan, or a merger or acquisition by another party.

Q. Any other factors that led you to this conclusion?

A. Yes, there were. In the whole area of precedent, which we feel is both—again to repeat myself, there are legal and financial precedents. In Christiana's history there were three transactions, each of which seemed to indicate net asset value as the appropriate criterion. These

three were the Delaware Realty merger and the Hercules and GM exchange offers.

Going beyond Christiana's own experience and looking at other comparable situations, we studied approximately 40 cases of investment companies merging with operating companies or with other investment companies under the Section 17 of the 1940 Act. Also some mergers that took place by companies who had exempted themselves from that Act, but where we felt the circumstances were otherwise comparable. And we could find no precedent which in our opinion suggested anything other than net asset value as the appropriate means of exchange.

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Q. You have described the factor or factors which led Kidder to conclude that net asset value was appropriate?

A. Yes. There is one other thing we did. We didn't want to be blind to the fact that someone might consider that market value was the appropriate consideration. And we noted in our report more or less parenthetically that it was our opinion if you had taken the other approach——

Q. When you say market value you are talking about the market value of the Christiana common?

A. Yes, sir. That if you had taken the other approach, that the resultant exchange ratio might very well be at least equivalent to what net asset value indicated, and if anything, might exceed that, on the grounds that typically —and we included in Exhibit G to our letter, premiums are paid to companies in acquisitions, very significant premiums, and we felt, if anything, for a company to acquire control of itself it might be willing to pay even a greater premium than typically. So that although we rejected the market value as the appropriate approach, we didn't conclude that if we had concluded otherwise that we would have ended up with a substantially different answer.

Q. There has been talk, or testimony, I suppose, concerning a liquidation under Section 333. Did the unavailability of a Section 333 liquidation affect your final recommendations concerning the merger terms to

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Christiana?

A. No, sir. Not our final recommendations.

Q. Did it play any part in your initial recommendations?

A. Yes, sir. As I indicated at the June 27th meeting that we had with the special negotiating committee, and also at our June 30 presentation to both negotiating committees, we indicated that certainly a range around net asset value of 1.7 percent was certainly reasonable. The 1.7 percent happened to be the number that was derived by Haskins and Sells and our counsel to be the floor, if you will, that would be provided by a very legitimate alternative, and it seemed that the Christiana stockholder would not accept a deal here that yielded him less than he could turn around and get almost literally the next day through the 333 liquidation.

Q. Now, you say it did play a part in those initial recommendations, but it did not play a part in your final recommendations, and why?

A. Well, we were informed over the weekend after our June 30 meeting that the convenient, if you will, floor that 333 had provided us until that point had become much less firm. And we were therefore forced as a firm to come to an opinion as to what range of variation around net asset value we could conclude would still be fair and reasonable and not involve overreaching. And finance is not an exact

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science. There is no way to say there is only one precise, fair answer. And after a great deal of deliberation within the firm we concluded that a range around net asset value, especially on the discount side, of up to 3 percent would still be within a normal range of variation, of error, but that figure within that range was substantially equivalent to net asset value and that we could conclude and did conclude that it was fair and reasonable and did not involve overreaching.

Q. In the course of Kidder's studies, Mr. Midgley, did you consider the possibility of adverse market impact upon du Pont common stock?

A. Yes, sir, we did. And there is quite a bit of discussion in our report on that subject.

Q. You are referring to page 8 and 9 of your report, are you?

A. Yes, sir.

I think it is obvious that the most important asset the Christiana stockholder has is his du Pont stock. And I think that a Christiana stockholder would share the concern of a du Pont stockholder that anything that would have an adverse impact on the du Pont stock would vitally affect the interests of the Christiana stockholder. And we would not have recommended to Christiana that they do anything that would materially affect their principal holding in an

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adverse way.

If you hypothesize that there would have been a material adverse effect on the market price of du Pont resulting from this transaction, I think our position as advisors to

Christiana would have been that Christiana should have been even better compensated for the deal to take account of that factor.

Q. In the course of your study, though, Mr. Midgley, did you conclude that there would in fact be any adverse effect on the price of du Pont common?

A. We concluded that there would not be a significant adverse effect on the market price of du Pont common, for a number of reasons. First, we were informed by counsel that there would not be any large sales of Christiana. Second, we were aware of the fact that approximately 70 percent, which in my experience is a relatively high number, of the stock would be restricted even after the transaction.

Thirdly, both from our knowledge of Christiana stockholders and the length of time that a lot of them had held their security, and also from looking at the trading activity after the announcement of the exploration of this transaction, that the Christiana stockholder did not seem to be trading-oriented; he was not an in-and-out kind of investor. He appeared to be a long-term investor, and as such that didn't suggest to us that there would be any

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significant selling.

A fourth and compelling reason is that we were aware that based on the distributions that have been made and the market history of Christiana——

Q. When you say the distributions that have been made, what distributions are you referring to?

A. Principally the GM distribution, in terms of reducing the basis substantially that holders at least at that time would have had. That many, the majority of Christiana stockholders clearly would have a significant capital gain

liability if they were to sell. He has held the security, he has perceived of himself as holding du Pont, he holds the du Pont, he has a capital gains liability; why is he going to change his mind because of this change in the form of investment as opposed to the substance.

Furthermore, there are many situations, most mergers, where the acquired company's stockholder has a much greater change in circumstance than the Christiana holder does. If a conglomerate acquires a bread company, there can be a very significant change in the circumstance to the stockholders of the bread company.

Q. When you say circumstance, are you talking about the nature of his investment?

A. The nature of his investment, its potential growth, the relative dividend pay-outs, the relative growth

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rates. And this is despite the fact that he has probably been paid a very handsome premium. But the point is it is our experience that acquiring companies' stocks are not hurt in the after-market, if you will, after the acquisition has been completed, even in these other cases where the change in investment characteristics is much more dramatic than it is in this case.

Furthermore, we have looked at the behavior of the market in du Pont subsequent to the announcement, some of which we obviously were able to do from April 28th to our July 7th report, and other of which we have been able to do subsequent to that until this morning. And we have concluded there is no evidence in the performance of du Pont that would indicate that the market felt that this proposed transaction had adversely affected the attractiveness of an investment in du Pont.

Q. Mr. Midgley, assume that there would be sales of du Pont common, substantial number, in large amounts following the merger if it is approved. Do you think those sales would have a permanent, lasting, adverse effect on the price of du Pont common?

A. No, sir, we do not. The self-interest of the seller I think tends to protect the market from any substantial adverse effect.

A seller or a group of sellers is not going to come

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into the market and disrupt it and drive the price down if it can help it, because that necessarily reduces the proceeds to him. So we have assumed that sellers, if given your hypothesis, if there were to be substantial sellers, that they would approach the market in a sophisticated way and that these distributions would be accomplished using sophisticated investment bankers and would be marketed in a way so that there would not be a lasting adverse effect of any significance, in my opinion, on the price of the du Pont stock.

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Q. Mr. Midgley, in your opinion, are the negotiated terms of the merger fair and reasonable to Christiana and its shareholders?

A. Yes, sir.

Q. In your opinion, Mr. Midgley, do the negotiated terms of the merger involve overreaching on the part of anyone?

A. We do not believe that there is any overreaching involved on the part of anyone.

Mr. Broderick: Your Honor, that concludes Mr. Midgley's direct examination. At this point I would like to move into evidence Christiana's Exhibits 1, 2 and 3.

Judge Ullman: Is there any objection? Received.

(Christiana's Exhibits 1, 2, and 3 were received into evidence.)

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: Yes, your Honor.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. Midgley, is the firm of Kidder, Peabody going to receive a fee for its services in preparing a report for this proposed merger?

A. We expect to, sir, yes.

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Q. Mr. Midgley, were you here the last three days?

A. It seems like three weeks, but I guess it has been three days.

Q. Do you have a pencil and paper, a piece of scrap paper?

A. I came prepared. I have a pocket calculator.

Q. Good.

As a businessman, and forgetting about the legal implications, do you see any practical difference in an approach to this proposed merger if instead of having Christiana merge into du Pont with the du Pont Company the

surviving corporation—if it were reverse, and the du Pont Company were to merge into Christiana. Do you see any reason for not having such a situation?

A. As I indicated, I have been here for the last three days, and I obviously heard you ask that question before

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and have had an opporunity to consider it. But I almost think you have answered your question by asking it.

If you want me as a businessman to strip this transaction of its form, of its legal form, the transaction is the same regardless of whether A merges into B or B into A or A and B into C. I think the essence of this transaction, economics, are not—or the interests that each party brings to the negotiation of the transaction are not changed by changing the form of the transaction in the way that you are doing. I think the negotiators coming to the bargaining table in your case would come with the same interests and with the same concerns that they did in this case. I really think that the situations are identical. And when I take the 1.123 ratio and take the reciprocal of it, I come very close to that seven-eighths figure that you approximated yesterday.

Q. Well, then, sir, having had the time to do the calculation, assuming that Christiana stock, each share has behind it one and one-seventh share of du Pont common, then do I understand you to say that if the du Pont Company were merged into the Christiana company on a pure net asset value basis, that each du Pont common stockholder would receive seven-eighths of a share of Christiana common. Is that your answer?

A. Yes, sir.

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Q. Now, at the time that the merger was announced, on April the 28th, 1972, I believe that du Pont common

had a range on the stock exchange of 169 high and 167 and three-quarters low, closed at 168¼, and that on the same day Christiana common was quoted at 147 bid and 150 asked according to the Wall Street Journal. So that in round numbers—in round numbers for my example, I would say that du Pont had a value of 168 on that day and that Christiana had a value of 148, and that if the merger went through, that the du Pont stockholder would receive seven-eighths of a share of Christiana, and my arithmetic is that seven-eighths of 148 is about $130.

A. Your arithmetic is good; your logic is not.

What would happen is that given the improbable set of circumstances that you have constructed, if the merger were to be done in reverse, you would have a new company, Christiana, but it would no longer be a holding company; it would now be an operating company. It would really be equivalent to what du Pont will be, given the transaction going the other way. And there would be less—on a pro forma earnings basis there would be fewer shares outstanding of the company, a whole different set of earnings and price-earnings ratios. And on the effective date of the trading of the common stock of the new Christiana, the market patterns, in my judgment, would reflect the same kind of market patterns and

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Q. Well, now, going back to your first statement, you said that one of the reasons that Christiana was organized was that there was a fear that the Germans were going to take it over. Is that correct?

A. That is part of the folklore that I picked up in connection with the—I believe it is correct. I have no reason to dispute it. But I also cannot—I have been told

that is the situation, but I wasn't—I am afraid to admit it, but I wasn't alive then.

Q. Well, sir, if I told you that Christiana was organized in 1915 and in 1915 there was a world war, that Germany was at war with England and France and that the Royal Navy, the British Royal Navy had a blockade around Germany, and that the newspapers, the American newspapers were full of stories of alleged atrocities by the Germans going into Belgium, would you still say that Christiana was organized to prevent the control of the du Pont Company from falling into the hands of the Germans?

A. I could do no more than repeat what I said before. It is my understanding that that was a motive in the creation of Christiana. It is not central to my argument, however.

Q. Well, getting back to your argument, this possibility

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of alternate merger partners of Christiana. Would you say that perhaps there is a little puffing in that?

A. I think one or two of the other people at the other side of the negotiating table that was representing your interest also took that position. It was our position that given the vast array of factors we considered, that that was one that was worth mentioning.

Q. Now, your second idea is this stock purchase plan?

A. Yes, sir.

Q. And essentially that would mean that the dividend would go to a trustee and the stockholders would tell that trustee to use those dividends to buy up Christiana stock. Is that the essence of it?

A. Yes, sir.

Q. Now, you said that there are two such plans, I believe one of them with the Madison Fund, offhand?

A. Yes, sir.

Q. I forget what the other fund was.

A. It was a closed-end investment company that we offered to the public, Paul Revere.

Q. Paul Revere.

Now, when you mentioned this possibility, were you aware of the nature and the extent of the stockholdings of Christiana?

A. Yes, sir.

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Q. Now, by that I mean—and I hate to throw a lot of numbers at you, but going to an exhibit that I believe that Morgan Stanley prepared, it says that at May 22, 1972, there were 338 Christiana stockholders who owned 1,000 or more shares of Christiana common stock; these stockholders held 11,183,254 shares or 95½ percent of the outstanding stock of Christiana.

Now, given that state of facts, do you believe that the stock ownership of Christiana was similar to the stock ownership of Paul Revere and the Madison Fund?

A. No. They are different, obviously. If the thrust of your question is did we necessarily assume—or were we here—that a Christiana plan of this sort would experience the same identical experience that the other funds had, we are not suggesting that. We just guesstimated 50 percent and said—and this is important, I think—if 50 percent accepted such a plan that that would have the effect every day—every single day, year in and year out, of doubling the volume of Christiana in the market place, all on the buy side. I think you not only have to look and make a guesstimate—and as an alternative Christiana could have tried the plan and seen if there was a response. We will never know until they do what the response would have

been. But it is not only the percentage of the Christiana stockholders that adopt it; you have to relate

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that buying power to the trading—in this case much more limited than the Madison Fund, trading volume that exists in the market. So it was our feeling, yes, probably a number of members of the du Pont family would not be willing to reinvest their dividends, that they wanted those dividends. But it wouldn't take many people, in our opinion, to go along with such a plan to have a significant addition to the buy side of the market on the day by day basis.

I might add that at the time of this report there were only two closed-end investment funds utilizing this device. It is my understanding that just about every fund that has been done since that time has adopted it.

Q. Well, how realistic, in your opinion, is it to talk about 50 percent of the stock ownership? By stock ownership, not shareholders, I mean 50 percent of the shares of Christiana being signed up for such a plan—how realistic is it to expect such?

A. Again, I don't think—and if we did it is a mistake—that we said in the report that it was our opinion that 50 percent would accept the plan. I think what we tried to say, if 50 percent were to accept the plan, that it would have a very dramatic—it would represent a very dramatic addition to the market. I think what you have to understand, these are two specific alternatives that we felt were of interest and helpful to our negotiators in

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this transaction. There are a number of other general kinds of fields that one could have. Tax laws change. Maybe some of the complexities on 333 some day will be ironed out. Any number of things.

I don't think our opinion rests—I know our opinion does not rest on the bedrock of an analysis that says that if there is no alternative it shouldn't be net asset value.

We are just suggesting that there are alternatives that could give a reasonable possibility that the Christiana stockholder could approximate his underlying net asset value. They could split the stock; a number of things.

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Q. But, Mr. Midgley, what I am trying to find and ask you in your opinion, how reasonable is it to expect that either one of these alternatives are practical?

A. I think it is reasonable to conclude that there is a possibility that some of these alternatives might assist Christiana in reducing or possibly eliminating the discount from net asset value without this transaction that we are presently considering. That is all we have said, and that is all we intended to say.

Q. I am not an expert on the stock market, anywhere near that, but if this stock purchase plan were adopted and it started going, it would tend to buy up the so-called floating supply of Christiana common?

A. It would tend to transfer the ownership of Christiana common from certain stockholders who came into the market to sell it to certain other existing stockholders who had expressed a desire to increase their participation in Christiana. Yes.

Q. Is my question inaccurate? Would it tend to dry up the floating supply, the market supply of Christiana common? I may not be using the right term, but do you understand what I am saying?

A. You certainly would be putting—I would agree with the presumption that the buyer of that stock would be a long-term—a presumption that he is a long-term holder

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is a reasonable one, and that that stock will not quickly be coming back to the market.

Q. I wish I had a better knowledge of stock market terminology, because you don't seem to answer my question yes or no.

A. Well—

Q. Can you answer it yes or no?

A. Yes.

Q. It would tend to dry up the floating supply, the market supply?

A. Yes, to a minor extent.

Q. To a minor extent?

A. Well, I have to make an assumption that if the trustee buys the stock for the plan—if he didn't buy it someone else would. And I have to measure, to answer your question, something I really can't measure, and that is what the relative likelihood of that other buyer selling before the trustee's buyer, and I don't know.

Q. Well, what I was trying to state was that—and ask you. Put it this way: I was trying to ask you if this plan went into effect and over a period of time, say a year, a year and a half, the trustee every dividend day would buy up Christiana stock, what would then be the effect after, say, a year's operation of this plan if somebody put a large amount of Christiana on the market as opposed—put 10,000

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shares, to be specific—put 10,000 shares on the market a year and a half in the future as opposed to if this stock purchase plan had not been in existence. Would there be any difference?

The Witness: Would you mind repeating that?

(The question was read back.)

The Witness: Let me try to answer what I think to be your question. I think you are concerned that over a period of time a program like this might dry up the liquidity of the market. Taking that to its interesting logical extreme, ten years from now all the buying power, all the liquid supply has been absorbed by the trustee on behalf of the people he was acting for. And a ten-thousand-share—and it had been that way for five years. And a ten-thousand-share block, the last remaining block, came into the market to be sold. The instructions the trustee has are—and he now has built up five years of dividends that he hasn't been able to put in the market that he has wanted to put in the market—that he would buy that up to net asset value. And I would guess that that block, if the trader of that 10,000 block knew what he was doing he could get from the trustee net asset value for it; that is his offer, or a penny under. I think the trustee would have to buy it.

So I don't want to be as dramatic as you, that

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it would dry up the supply, but to the extent that it does it has exactly the effect we were hoping it would have, of reducing and eventually eliminating at the extreme the discount. So if your concern about the liquidity is correct, it is because our plan is working, I believe.

Q. If the stock purchase plan were adopted, you state that it would decrease the liquidity to an extent of the over-the-counter market of Christiana?

A. If the plan were adopted and a significant amount of the Christiana stockholders accepted the offer—

Q. Yes, sir.

A. Over a long period of time that could have the effect of reducing the liquidity of the Christiana market, yes. I believe so.

Q. Now, if it did reduce the liquidity of the Christiana market, would that be against the interests of the large stockholders of Christiana?

A. No, except in one respect. To the extent it is reducing the liquidity, it is my opinion it is also reducing the discount. So for most Christiana stockholders that is an advantage.

I think the only Christiana stockholder that would consider it a disadvantage is one who felt that he was near death and that his estate might have a higher valuation on the shares through the operation of this plan than it would

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AFTERNOON SESSION.

(1:45 p.m.)

Judge Ullman: The hearing will please come to order.

Mr. Broderick, you wanted to call a witness, I believe?

Mr. Broderick: I think that Mr. Smith will call Mr. Harter.

Judge Ullman: Oh, Mr. Smith. All right, sir.

Mr. Smith: Yes. I would like to call Mr. Raymond Harter.

RAYMOND J. HARTER

took the stand, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Smith:

Q. Will you state your name and business address, please?

A. My name is Raymond J. Harter. I am a vice president in the trust division of Manufacturers Hanover Trust Company, 350 Park Avenue, New York City. I am in charge of the special assets department of the bank, and in that capacity I am responsible for securities of closely held corporations.

Q. Mr. Harter, would you describe your educational background and your employment experience with the bank?

A. I have a bachelor of science degree in economics

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from Villanova in 1934, and a master of business administration from Harvard Business School in 1938. I came with the Manufacturers Hanover Trust Company in 1941, then the Central Hanover Bank and Trust Company. And I have been an investment analyst with them ever since.

For the period 1953 to 1961 I was a senior chemical industry analyst, and from 1961 to 1971 I was a senior industrial analyst.

Since 1971 I have been the head of the special assets department.

Mr. Murtaugh: Special what department?

The Witness: Special assets department.

I have been since 1955 a member of the officers' investment committee, which is the investment policy-making committee for the trust department.

Since 1952 I have been a member of the New York Society of Security Analysts. I am a chartered

financial analyst, and have been since that institute chartered its first class in 1963.

By Mr. Smith:

Q. Mr. Harter, approximately what is the market value of the securities which the bank holds in trust?

A. About $10 billion of securities for which we have investment responsibility.

Q. How many shares of du Pont common stock are held

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by the bank in trust with investment responsibility?

A. We have about 258,000 shares of du Pont in 860 accounts with a market value of about $46 million.

Q. Does the bank currently permit its trust portfolio officers to purchase du Pont common stock?

A. Yes, it does. Du Pont common stock is on what we call our representative common stock list. It is a rather long list of common stocks which have been approved for purchase by the portfolio officers of the trust department. They may buy those securities in whatever amounts are appropriate for the individual accounts.

Q. Do you happen to know how long du Pont has been on this representative common stock list?

A. Oh, for at least the last ten years.

Q. Mr. Harter, how many shares of Christiana common stock does the bank hold in trust?

A. We have about 4,000 shares, with a market value of $720,000.

Q. In your work, sir, as senior industrial analyst, did you have occasions to consider mergers and other reorganization proposals involving industrial companies?

A. Yes, sir. As senior industrial analyst, I had the responsibility for preparing recommendations not only on

individual securities but also on the voting of stock in reorganizations where stockholder approval was requested.

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Q. Would you describe the functions of the officers' investment committee?

A. The officers' investment committee is the—as I mentioned before, the top policy-making committee for the trust division from an investment viewpoint. It is a group of about 35 persons. They meet once a week to consider overall investment policy, review reports on individual companies and industries, and to pass upon recommendations on individual companies and on such matters as recapitalizations and mergers.

Q. Mr. Harter, in addition to the work you perform directly in reviewing reorganizations and preparing investment recommendations, have you also considered such matters as a member of the officers' review committee?

A. Yes, sir.

Q. Mr. Harter, are you familiar with the evaluation of closed-end investment companies?

A. Yes. As head of the special assets department I have been responsible on numerous occasions for valuing securities of closely held investment companies, primarily for estate tax purposes.

Typically, these are family holding companies for which there is no public market.

Q. Are you familiar with the fact that the stock of many publicly held closed-end investment companies sells at

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a discount from the market value of underlying assets of those companies?

A. Yes, sir.

In the evaluation of the securities of the closely held investment companies it has been my practice to determine the net asset value taking portfolio securities at market prices. I then examine a group of publicly owned and publicly traded closed-end investment companies to determine the discounts at which their securities are selling in relation to their net asset value. From this group I select a representative discount to apply to the net asset value of the closely held corporation in order to arrive at a fair market value.

Q. And this process of evaluation is to determine the fair market value of the investment company's outstanding stock principally for estate tax purposes?

A. Yes, sir.

Q. Mr. Harter, what, in your opinion, are the principal factors that lead to the market price of publicly held closed-end investment companies representing a discount from underlying net asset value?

A. Well, there are various factors that enter into the discount. In my opinion the principal factor is the liability for capital gains taxes on unrealized appreciation. Other factors which might affect a discount might be the

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performance record of a fund, the nature of the securities held, whether they are blue chips or speculative securities, and the psychology of the market at the time.

Mr. Smith: I would like to have marked for identification at this time du Pont Exhibit No. 5, which is a document entitled "E. I. du Pont de Nemours & Co., Notice of and Proxy Statement for Special Meeting of Stockholders." And it is identified at the top as "Preliminary Copy."

This is part of the record. It was filed as part of the joint application, and it is already part of the record in this case. I would like to have it marked for identification at this time. We will later present a witness who will testify as to the matters contained therein. But as I explained before lunch, we are going a little bit out of order because of Mr. Harter's problem on getting back to the bank.

Judge Ullman: Very well.

(du Pont Exhibit 5 was marked for identification.)

By Mr. Smith:

Q. Mr. Harter, have you examined the exhibit which has been marked du Pont Exhibit 5, the preliminary proxy statement?

A. Yes, sir, I have.

Q. May I call your attention to page 4. At the

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bottom of that page there is a paragraph which begins "Christiana common stock has traditionally traded at a discount compared to the market value of the net assets underlying the Christiana common stock. Over the two years preceding April 28, 1972, the date on which it was announced publicly that a possible merger would be considered, this discount generally was in the range of 20 to 25 percent—and was 23 percent on that date."

Mr. Harter, based on your review of the preliminary proxy statement, do you have any opinion as to factors which might have caused this discount referred to?

A. Yes. I think primarily it reflects the capital gains tax liability. On that date, April 28, 1972, the du Pont common stock owned by Christiana had a market value of

well over $2 billion, and a tax cost basis of $74, $75 million, the balance being the unrealized appreciation subject to tax. At a 30 percent tax rate, the capital gains tax on that appreciation would be equivalent to about 29 percent of the total market value of the securities held. With the Christiana stock selling at a 23 percent discount, I would say that was a fair reflection of the tax liability.

Q. Mr. Harter, you testified that you have examined this preliminary proxy statement. On the basis of this review, and assuming that a final proxy statement is submitted to the stockholders of du Pont setting forth the merger

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terms contained in the preliminary proxy statement, and assuming that the matters of fact set forth in the proxy statement are substantially as set forth in the copy you have examined, will you recommend that the bank vote its trust holdings of du Pont common stock in favor of the merger?

A. Yes. On that basis I will recommend that the shares be voted for the merger.

Q. Would you explain the basis on which you have reached this conclusion?

A. It is apparent from the preliminary proxy statement that the merger terms are based primarily on the net asset value of Christiana Securities. In my opinion, it is fair and reasonable to value investment companies at their net asset value.

In this particular case, the du Pont common stock now held by Christiana Securities will be taken over by du Pont and immediately cancelled so that there will be no capital gains tax on the unrealized appreciation on those securities.

As I just mentioned, in my opinion one of the principal factors accounting for the discount at which investment company securities sell from their net asset value is this exposure to capital gains tax. With the elimination of that tax there should be little or no weight given to the market value of Christiana common stock.

Q. Mr. Harter, are you aware of any alternatives

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available to Christiana by which it might be able to——

A. No, sir, I am not.

Q. —achieve the total net asset value?

A. No, sir, I am not.

Q. Does the absence of any alternatives to Christiana affect your view as a person with responsibility for 258,000 shares of du Pont common stock as to the merger terms?

A. No, that would not affect my opinion.

Q. Have you had occasion to review the computation of net asset value of Christiana which is set forth in the preliminary proxy statement?

A. Yes, I have. And I am in agreement with the computations used. Since du Pont Company intends to dispose of its holdings in the Wilmington Trust Company and the News-Journal, it seems appropriate to take into consideration the capital gains taxes on those transactions. Also, because of the many uncertainties surrounding Christiana's tax claim, it seems appropriate to eliminate that claim from the merger considerations and to provide alternate means by which any recovery of that claim can be passed on to the Christiana stockholders.

Q. Have you had occasion to consider the merger terms in relation to, say, a year-end relationship of the net asset value of Christiana to the du Pont price over a period of time?

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A. I have made a study of the Christiana year-end net asset value in relationship to the year-end market prices of du Pont common stock for each year from 1965 to 1971. For the purposes of that calculation I eliminated the tax claim in all years, and I deducted the Christiana preferred stock at its redemption price of $120 a share. The result of the study was an average exchange ratio of 1.15 shares of du Pont common for each share of Christiana, which is very close to the 1.123 shares of the merger terms.

Q. Mr. Harter, in your opinion, is du Pont receiving adequate benefits in this merger?

A. Yes, sir. As a stockholder of du Pont, I would regard the dispersion of the 28 percent interest now held by Christiana Securities among some 7,000 or 8,000 stockholders as being a very significant benefit to du Pont. At the same time, there would appear to be no disadvantages to du Pont in the merger.

In my opinion, so long as the merger terms would involve no dilution in the pro forma earnings per share of du Pont, I would consider them as reasonable.

Actually, since there is a 2½ percent discount from net asset value of Christiana, there is a 4 cents per share increase in the pro forma earnings per share of du Pont. This will probably not be reflected in the market price, but at the same time, under the circumstances, I would regard it

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as a reasonable inducement to du Pont stockholders.

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Q. Mr. Harter, did you consider whether there might be any adverse market impact following this merger resulting from possible sales by shareholders of Christiana?

A. No, my analysis was based on a study of the proxy material. The material made no mention of any such distributions that were pending or might be forthcoming. Under full disclosure requirements I would expect that if either of the companies had any knowledge of such a distribution, that it would have been mentioned in the proxy material.

Also, the capital gains tax problem that is presented to the long-time large stockholders of Christiana securities would undoubtedly be a very strong deterrent in their selling their shares.

Q. What is the capital gains tax impact to which you are referring?

A. The difference between their cost basis and the selling price. The cost basis on their Christiana securities would, of course, be carried over into the du Pont stock.

Q. Do you have any reason to believe that the cost basis of Christiana shareholders might differ in any material respect from that of the average investor?

A. Yes. Since these are long-term family holdings they are probably reasonably low cost to start with, and then by virtue of the General Motors distributions that were made, their cost basis must have been reduced to zero or very

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close to that.

Q. Do any of the holdings of Christiana common stock by the bank have an unusually low cost basis for these reasons?

A. I cannot speak for the present cost basis, but I do know that at the time of the General Motors distributions our Christiana holdings were reduced to low cost at that time.

Q. Mr. Harter, in your opinion are the terms of the merger fair and reasonable to du Pont and its stockholders?

A. Yes, they are.

Mr. Smith: Thank you, sir.

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: A few questions, Your Honor.

By Mr. Collins:

Q. Mr. Harter, yesterday there was a Mr. Edward Townsend who came down here and testified. He is with The First Boston Corporation. And he said that before he was with The First Boston Corporation he was with the Central Hanover Trust Company in New York. Were you working with him at the time?

A. I did not know him at the time. We just happened to overlap for a very short period of time. I came with the bank just about the time that he left.

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Q. Well, then, in this situation you clearly are the person within the bank who knows the most about——

A. Yes, sir.

Q. —this proposed merger.

I believe you testified, Mr. Harter, that the absence of alternatives did not—or would not in any way affect your decision to vote favorably for this merger. Is that correct?

A. Would you say that again? Read it back.

Judge Ullman: Would the reporter please read the question.

(Question read.)

The Witness: That is correct.

By Mr. Anderson:

Q. On the other hand, would you find the absence of alternatives in any way supporting your decision to vote affirmatively for this merger?

A. No, I think it is just not a factor in the decision.

Mr. Anderson: No further questions. Thank you, Mr. Harter.

Judge Ullman: Mr. Smith, is there anything further?

Mr. Smith: We have nothing further, Your Honor.

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C. EDWARD MIDGLEY.

By Mr. Murtaugh:

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A. If your question—and if I heard it correctly—was that if 28 percent of the du Pont stock were immediately going to be sold on the market——

Q. I didn't say immediately. I said it would be sold—it was available for sale and will be sold to some extent, some will rush at the first probably and then a little slower at the end, or maybe a little slower in the middle and not much of a rush at the first. But don't you think that is a

serious consideration in considering whether the outside shareholders of du Pont should vote in favor of the merger?

A. To answer that may I assume the present situation instead of the hypothetical one that you came to Kidder with?

Q. O. K.

A. As I indicated this morning, I think the possible market impact after the merger is a very important factor because from the point of view of the Christiana stockholder it is his principal asset. And I feel that we have done extensive study and research and have satisfied ourselves, and I think subsequent events has borne us out, that most of the available—most of the new du Pont shares will not be put into the market place.

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By Mr. Anderson:

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Q. And in your opinion the du Pont Corporation is being compensated adequately for its role in helping the Christiana shareholders receive their—realize their net asset value on this proposed merger?

A. Yes, sir.

Q. Would you say so in part because although a substantial benefit is being realized by the Christiana shareholders it is not at any particular cost to the du Pont Corporation?

A. That would be part of our—the basis for that judgment, yes, sir.

Q. I believe in another part of your testimony you referred to the fact that du Pont was gaining through this

merger the potential to control itself, or taking away a potential block of control of itself. Is that correct?

A. I believe that comment that you are referring to arose from my parenthetical digression, if you will, in response to a question by—or my direct testimony where we were talking about if we had chosen the market value approach as opposed to net asset we might—is that the area that your question is?

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PROCEEDINGS.

Judge Ullman: The hearing will please come to order.

Mr. Anderson, I believe one of the first matters on the agenda was the movement of a Division exhibit into evidence.

Mr. Anderson: Yes, Your Honor. Just before the reporter collapsed yesterday, I meant to move Division Exhibit 12 marked for identification into evidence. And I do so now.

Judge Ullman: Is there any objection?

It is received, with my added notation that Mr. Anderson's comment was made in jest. Half in jest, I should say.

(Division's Exhibit No. 12 was received in evidence.)

Judge Ullman: Mr. Smith?

Mr. Smith: I would like to call Mr. L. E. Grimes to the stand.

Whereupon,

L. E. GRIMES

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Smith:

Q. Would you state your name and business address for the record, please?

A. My name is L. E. Grimes. My business address is

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1007 Market Street, Wilmington, Delaware.

Q. What is your present position with the du Pont Company, Mr. Grimes?

A. I am an assistant treasurer of the du Pont Company.

Q. How long have you held that position?

A. Since 1962.

Q. Would you describe your prior positions with the du Pont Company?

A. For a period of some 25 years or so I held a variety of supervisory and management positions in the accounting and financial areas of the company's activities.

Q. Sir, would you describe your responsibilities in connection with the proposed merger of Christiana into the du Pont Company?

A. My general responsibility on that matter was to organize and supervise the work of a financial staff group to perform the staff work that was required by the company to study and work out the various problems and so on of the matter. And those activities were carried out within the general framework of guidance from our negotiating committee and from counsel.

Q. Sir, following the initiation of the merger proposal by Christiana, did you prepare any documents for the guidance of the management of du Pont and its counsel?

A. Yes. I prepared various documents. The initial

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one I think was a memorandum for counsel to outline the background material on Christiana and the du Pont Company, and mention and analyze and comment on a variety of matters that we thought might be pertinent for consideration in studying the merger proposal.

Q. Were you responsible for the preparation of supporting material for the use of the special negotiating committee appointed by the du Pont Company?

A. Yes. That was a continuing function, to assemble and make available to the negotiating committee a wide variety of material and analysis work that might be useful for them in their consideration of the matter.

Q. Were you responsible for giving any material to the investment banking firms retained by the du Pont special committee?

A. Yes. We assembled a collection of background material, principally financial, and made it available to Morgan Stanley and to First Boston Corporation to give them that kind of background as a start to study the merger proposal.

Q. And were you available for consultation, either at meetings or by telephone, to those two firms?

A. Yes, I was, and I did engage in that kind of activity.

Q. Mr. Grimes, following the agreement of the special committees of the two companies as to merger materials, what

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was your responsibility in connection with the preparation of a merger agreement?

A. It was my responsibility to represent du Pont interests in drafting that agreement, working with our counsel and in collaboration with counsel for Christiana.

Q. Late in July the du Pont Company and the Christiana Company filed a joint application to the Securities and Exchange Commission for authorization under the Investment Company Act. Were you responsible for the preparation of that document insofar as du Pont is concerned?

A. Yes. That was developed in the same manner as the merger agreement.

Q. There were some six amendments to that application filed. Did you likewise have responsibility for the preparation of those amendments?

A. Same approach.

Q. Yesterday there was marked for identification du Pont Exhibit 5, which bears the title "Notice of and proxy statement for special meeting." It is marked as a preliminary copy.

Do you have a copy of du Pont Exhibit 5 in front of you, Mr. Grimes?

A. Yes, the preliminary proxy statement.

Q. Was this filed as an amendment to the joint application?

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A. Yes, it was filed in one of the amendments to the application. I believe it was Amendment No. 5.

Q. Was this proxy statement prepared under your supervision and direction?

A. Again, it was with the assistance of counsel and in collaboration with counsel for Christiana.

Q. In your employment at the du Pont Company have you had occasion to become generally familiar with the preparation of proxy material and other documents for submission to the Securities and Exchange Commission?

A. Yes. I have prepared material of this character on a number of occasions.

Q. Mr. Grimes, the proxy statement contains business and financial data relating to the du Pont Company. Are you generally familiar with the matter contained in the proxy statement insofar as it relates to du Pont?

A. Yes. I think I am quite familiar with that material. I have been exposed to that background for about 35 or 36 years.

Q. The proxy statement also contains data concerning Christiana Securities Company. Are you generally familiar with the matters set forth concerning Christiana in the proxy statement?

A. Yes, I am also generally familiar with the Christiana material and background.

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Q. Mr. Grimes, I would like to direct your attention to page 20 of du Pont Exhibit 5. At the top of that page there is a caption, "Rights of Christiana Preferred Stockholders Objecting to the Merger." And in general the material under that caption indicates that holders of Christiana preferred stock will have appraisal rights under Delaware law in connection with this merger. It further indicates that a person who perfects those appraisal rights is entitled to have the value of his stock determined by an appraiser appointed by the Delaware Court of Chancery.

It does provide, however, that prior to a court proceeding du Pont and the stockholder who perfects his appraisal rights may agree as to the value of the stock.

Has the du Pont Company indicated any intention as to the course which it will follow as to any Christiana preferred stockholder who perfects his appraisal rights?

A. Yes, it has.

Q. And what is that intention?

A. We have indicated it is the present intention of du Pont to offer $120 in cash per share for the Christiana preferred stock in any case of a stockholder who objects to the merger and perfects his appraisal rights and demands such payment.

Q. And have you indicated that intent to the Christiana Securities Company?

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A. Yes, we have.

Q. Do you happen to know if they have taken any action on that?

A. I understand that they sent a letter to each of the preferred stockholders to that effect recently, sometime in December. In fact, I have seen a copy of that letter.

Q. Now, Mr. Grimes, I would like to direct your attention to page 17 of the proxy statement, du Pont Exhibit 5.

The first caption on that page is, "Affiliates of Christiana," and the material under that caption states that directors of Christiana and certain other stockholders of that company may be deemed to be affiliates of Christiana within the meaning of the Securities Act of 1933 and the rules and regulations thereunder.

Would you explain what an affiliate is?

A. The regulations under the 1933 Act specify a definition of an affiliate for purposes of that Act, and the definition that is specified is that any person who controls, is controlled by, or is under common control with another person is deemed to be an affiliate of that other person.

We have been advised by counsel that that definition should not be construed narrowly to apply only to situations where actual control or controlling influence might exist because the Commission interprets it more broadly to embrace as well situations where there might be potential for control

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or exercising of controlling influence.

Q. Mr. Grimes, how did you determine those persons who might be deemed to be affiliates of Christiana?

A. Well, the application of the definition that I have just mentioned to the particular case in hand here is not so very easy. There are a number of relationships among du Pont and Christiana and Wilmington Trust Company, relationships in the form of stockholdings, relationships in the area of directors where some directors are directors of two of the companies and indeed some are directors of all three of those companies. And also there is a range of commercial business relationships aside from that. So those factors made it quite difficult, and indeed we thought impossible, to make any precise determination as to the degree of control or controlling influence that might exist for purposes of identifying who affiliates might be. And in studying the matter with our counsel and with counsel for Christiana, we arrived at a conclusion that we all felt was the right one: That in the interests of making sure that du Pont observed its responsibilities under the securities laws and that our stockholders would do likewise, we would proceed to identify affiliates on the basis of the assumption, without any prejudice to whether that is the fact or not, that at the time of the merger du Pont and Christiana and Wilmington Trust would be considered to be under common control.

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Q. Now, what categories of individuals and corporations or other entities are affiliates as would flow from that position which was taken?

A. There flows from that basic determination a list of affiliates along these lines: First, each director of du Pont would be deemed to be an affiliate under that approach. Also, each director of Christiana would be deemed to be an affiliate. The Wilmington Trust Company as an independent business entity in itself would be deemed to be an affiliate. Each of the directors of Wilmington Trust would be deemed to be an affiliate.

In the process of our studies we learned that there are a few instances of charitable foundations, four in number, in fact, where there is an appreciable number of the directors of one or the other of the companies among their trustees and there might be a situation that could be considered that those people could control the foundation, so we chose to deem them to be affiliates for this purpose.

And then in addition, any trust or any estate or any corporation or other business entity if there might be such a thing in which any of the people that I have mentioned as affiliates could be deemed to be in control or have a beneficial interest in also would be affiliates, which aggregates to quite a few affiliates.

Q. Mr. Grimes, on Monday Mr. Ernest May appeared and he

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stated, as I recall, that he owned directly about .06 percent of the outstanding stock of Christiana, and he indicated that he believed that some position had been taken that this stock was restricted stock, possibly on the grounds that he was a part of this group of affiliates that you have mentioned.

Have you had occasion to consider the matter of Mr. Ernest May?

A. Yes, we have considered his holding in the course of our analysis of this matter.

Q. Have you determined whether he will be treated as an affiliate?

A. We have determined that the stock that he holds directly would not be considered to be stock held by an affiliate.

Q. Now, as I recall, Mr. May also mentioned that a member of his family, I believe his wife, had some holdings that were held in trust, and he indicated that this stock might also be treated as restricted stock.

A. Yes.

Q. Do you know the stock to which he is referring?

A. Yes, I think I do.

Q. What sort of trusts are involved in that case?

A. I believe those shares are held in trust for which there are three individuals operating as the trustees for the trust.

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Q. Are any of those individuals affiliates under the definition that you have——

A. Yes. One of those trustees is Mr. Irénée du Pont who is a director of du Pont, a director of Christiana, president of Christiana, and a director of Wilmington Trust, also, I believe.

Q. Prior to the commencement of these hearings had you had occasion to inform Mr. May of the determination with respect to the two stockholdings as to which he testified?

A. Yes, I did.

Q. When was that?

A. In October of '72, I believe.

Q. You made clear to Mr. May that the stockholdings in the trust to which he referred would be treated as restricted stock because it is under the control of an affiliate?

A. Yes, I think that is correct.

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Q. Now, Mr. Grimes, on the basis of the determination of affiliates of Christiana to which you referred, can you tell me how du Pont determined what amount of Christiana common stock were held by such affiliates?

A. Yes, I can. We arranged for each of the companies, du Pont, Christiana, and Wilmington Trust, to send a questionnaire to their directors and ask for them to report their holdings of Christiana stock and du Pont stock as of the end of September, 1972. And the responses to those questionnaires gave us information as to the holdings of the individual directors of the three companies.

We obtained similar data by questionnaire from the charitable foundations that I have mentioned, and as a result of some discussions with Wilmington Trust, Wilmington Trust has analyzed their holdings and given us information on their holdings of Christiana stock as of a more recent date, somewhere in mid-January of this year, I think January the 17th or 19th; I am not sure of the exact date.

Q. What is the approximate total amount of shares of Christiana held by affiliates based on this investigation which you have made?

A. After having assembled all this information and arriving at an aggregate, we find that nearly nine million shares of the outstanding shares of Christiana common stock

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are held by people that we propose to treat as affiliates,

and that represents slightly more than 75 percent of the outstanding shares.

Q. Mr. Grimes, would you explain what restrictions apply to affiliates of Christiana under the Securities Act of 1933 with respect to stock of the du Pont Company received in the merger?

A. It is my understanding that affiliates of Christiana who receive du Pont stock in the merger will not be permitted to make public sales of those shares of stock except by two means. First I understand they will be permitted under the provisions of the '33 Act to dispose of any volume of shares that they might wish at any time provided the sale of the shares is covered by an effective registration statement; and secondly, without registration individual affiliates I understand would be in position to sell subject to certain detailed limitations on how they handle the transaction, up to about one week's trading volume in a six-month period—one week's trading volume in du Pont stock in a six-month period in so-called brokers' transactions. That would mean that an individual affiliate could sell upwards of 50,000 or 60,000 shares in a six-month period, perhaps more, depending upon the volume of trading in du Pont at the time.

Q. Mr. Grimes, if affiliates of Christiana were to

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develop a plan to act in concert to sell under this broker's transaction which you have referred to, would each such affiliate be entitled to sell up to one week's trading volume?

A. The comment I just made on individual affiliates having the opportunity to sell up to that volume was on the assumption there would be no acting in concert. In the event that two or more of them should proceed in such a manner that it would constitute acting in concert, then the

limitation would apply to that group as a whole rather than to the individuals, and the group as a whole would be restricted to that level of sales.

Q. Mr. Grimes, again at page 17 of du Pont Exhibit 5 there is a statement towards the end of the first paragraph under the caption "Affiliates of Christiana" that du Pont has agreed with affiliates that they will receive certain registration rights under the Securities Act of 1933. Would you describe those rights, please?

A. Our present plan is to make available to the Christiana affiliates the right to register their shares on two occasions if they desire to do so and ask us to file a registration statement—two occasions during a calendar year, one occasion to make sales during the month of April, and on the other occasion, to make sales during the month of October. And there is no specific requirement of volume involved in those aspects of the registration rights.

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Independent of that particular provision——

Q. May I stop you just a moment there. Are there any limitations as to the type of sales which may be made under registration rights during April and October?

A. Oh, yes. I failed to mention, the sales pursuant to those registrations cannot be in the nature of firm commitment underwritten sales.

Q. I am sorry I interrupted you. You were about to say that there is an additional registration right?

A. I am about to come to firm commitment underwritten sales now.

Independent of the arrangement for registrations and for sales in April and October we have agreed to file one registration statement in a calendar year if requested by one or more of the affiliates for a firm commitment underwritten offering, subject to the provisos that such an offering not be at the same time as the April and October sales and subject further to the proviso that the amount involved be at least $25 million.

Q. And that would be one registration right a year for all persons who were affiliates?

A. That is correct. One registration right in that year.

Q. In other words, a person would be given an opportunity to join in it, but if he did not join in it he would not have

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any further right during the course of that year to request a firm commitment underwritten offering from the du Pont Company.

A. That is correct.

Q. Did you have any advice from investment bankers in developing this registration rights proposal?

A. Yes. We discussed the matter with Morgan Stanley jointly with counsel for Christiana, and out of those conversations developed this pattern of registration rights that seemed reasonable in the circumstances.

Q. Mr. Grimes, we have heard testimony here the past several days that secondary offerings, and particularly large secondary offerings, require a certain amount of skill and expertise in the placement of stock and the distribution of stock in order that the marketing program be handled successfully.

Under the general agreement as to registration rights which you have described, has du Pont taken any steps to assure that a skilled senior managing underwriter will be available to handle any firm commitment underwritten secondary?

A. Yes, we have. We have provided in the form of agreement that we intend to enter into with the affiliates

that in the case—in the event there is any such underwritten offering it will be handled by an underwriter

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with Morgan Stanley as the underwriter or alternatively some other underwriter that would be acceptable to du Pont.

Q. Mr. Grimes, has du Pont ever entered into a contract providing for registration rights in connection with unwritten secondaries before?

A. Not to my knowledge.

Q. For example, in the acquisition of the Endo Pharmaceutical Company?

A. I will correct myself if I may. I was thinking of the former registration that we filed in that case. But it is true that the contract we entered into provided that the Endo people in the acquisition transaction we had three or four years ago would be entitled to have underwritten offerings if they requested them. They have not requested any as yet.

Q. Does the contract provide a similar form of protection insofar as du Pont Company is concerned with respect to the senior managing underwriter of such a secondary offering?

A. Yes, it does. Slightly different form in that case. Morgan Stanley is designated as one of the acceptable underwriters and three or four other firms were also mentioned by name as being the firms that would be acceptable for the purpose. At the request of the attorneys for the other side we specifically identified firms in that case.

Q. I take it there was no such proposal to specifically

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identify other firms here?

A. No, there was not.

Q. Mr. Grimes, has the registration rights agreement which you have described been reduced to a written form?

A. Yes. I think it must be said to be draft form at this stage, however, because we have a few minor details yet to be settled in some conversations we are having with Wilmington Trust about the matter. But I believe the draft is substantially as the end result will be.

Q. Has there been general agreement on the part of all persons concerned with this as to the basic framework which you have described?

A. Yes. The general pattern of registration rights has been found to be acceptable to all parties.

Q. And you have testified that du Pont intends to treat the Wilmington Trust Company as an affiliate, and you have stated that you have discussed the registration rights agreement with that bank?

A. Yes. We made a draft of the agreement available to them because of their substantial potential holdings of our stock and invited their comment, and indeed made some editorial changes as a result of their comment. And I have discussed it with them, with officers of Wilmington on two or three occasions.

Q. And have they indicated that they have agreed in

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principle to the format of the registration rights agreement?

A. Yes, they have.

Q. Mr. Grimes, yesterday Mr. Raymond Harter testified, and in the course of his testimony he indicated that he had examined du Pont Exhibit 5, and he was asked whether he was aware of any significant sales to take place following the merger. He stated that the document he had examined, du Pont Exhibit 5, did not indicate that there

were any plans to dispose of the stock by the former shareholders of Christiana following the merger.

Now, you have testified that you were responsible for the preparation of du Pont Exhibit 5. In the course of your work have you had occasion to consider whether there are any plans on behalf of large Christiana stockholders to sell du Pont stock which they may receive in the merger?

A. Yes, I have.

Q. When was the first occasion on which this matter was discussed?

A. The first occasion that we discussed this area of the matter was on April 28th, the day that the public announcement was made that du Pont and Christiana would consider a possible merger.

Q. What happened on April 28th?

A. On April 28 there was a meeting in Wilmington of counsel for Christiana, counsel for du Pont, and some

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representatives of du Pont to work out a general coordinated plan for each of the companies to approach the study of the merger and collaborate in drafting the documents and the development of background material and so on. In the course of that meeting, counsel for Christiana made it plain that they would expect in the event that the transaction matured to ask for registration rights for the affiliates who might be restricted in sales of their stock so that they could be in position to sell shares of du Pont after the merger if they wished to.

We discussed at some length the question whether anyone at the meeting had any knowledge of any intent on the part of any person to sell shares of du Pont following the merger. Among the du Pont people and among the du Pont counsel there was no knowledge of that.

We asked Christiana counsel what they knew about the matter, and they assured us that they had considered it carefully and were quite sure that there was no intent to make sales in any substantial volume following the merger and felt that they had good reason to have that belief, but nevertheless said that at our request they would investigate the matter in more detail to suit at a later time.

Q. Subsequent to the meeting on April 28th did you have any further report on whether this study and investigation had been made?

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A. Yes. Yes, I did.

Q. When was that?

A. That was in the latter part of July. I don't know the exact date, but it came about at the time that I was having discussion with Christiana counsel regarding the filing of the requests for a tax ruling, one part of which is the need to make a representation as to continued holdings of shares received in the merger relative to a requirement of the tax law for continuity of interest for a tax-free ruling. And I asked Christiana counsel to tell me what the outcome of their investigation on the matter of intents to sell had been and was informed by Christiana counsel that at the meeting on July 17th, when the matter of approving the proposed merger in principle was before the Christiana board, that they had polled the Christiana board individually asking them, each person, whether he had any intent to sell any of the shares received in the merger or knew of anyone who had any such intent, and the result of that was a negative response from each of the directors of Christiana.

Christiana counsel further told me that with the approval of the Christiana board within a day or two after that they had discussed with officers of Wilmington Trust

Company what the intent of the Wilmington Trust Company might be regarding sales of du Pont stock received in the merger, and were informed by the officers of Wilmington Trust Company

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that they had no present intention to make any sales of stock after the merger; however, their fiduciary responsibilities might require them to make sales from time to time in the event of deaths and the requirement for settlement of estates and that sort of thing.

Q. In the course of your negotiation of the registration rights agreement, has any affiliate of Christiana ever indicated to you that he has a present intention to dispose of stock following the merger?

A. No, sir.

Q. Does that include discussions with Wilmington Trust Company?

A. Yes. In the course of my discussions with Wilmington Trust Company, they have said to me at least once and perhaps more that they have no present intention to make any sales of stock—du Pont stock following the merger, but they have also said to me as they did to Christiana counsel that they operate in a fiduciary capacity and have to meet their fiduciary responsibilities and undoubtedly from time to time if they need to settle an estate or for some other specific reason they might be required to make sales of du Pont stock.

Mr. Smith: I would like to have marked for identification Applicants' Joint Exhibit No. 4, which is entitled "Agreement and Plan of Reorganization," and the first line indicates that it is dated December 20th, 1972.

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(Applicants' Joint Exhibit 4 was marked for identification.)

By Mr. Smith:

Q. Mr. Grimes, earlier you testified that you were responsible, along with the assistance of counsel, for preparation of the agreement and plan of reorganization with respect to merger. Is this document which has been marked for identification as Applicants' Joint Exhibit No. 4 the end product of your work?

A. Yes, sir, it is.

Q. Now, you will note that the exhibit is dated December 20, 1972. Were earlier drafts of this document filed with the Securities and Exchange Commission as part of the joint application?

A. Yes. The document that we are talking about here dated December 20 was executed on that day by the companies involved, but an earlier copy of this was a part of the proxy statement that we had been discussing earlier which was filed as an amendment to the application for exemption order I believe as a part of Amendment No. 5.

Q. Is the Applicants' Joint Exhibit No. 4 substantially the same document as the draft agreement which was filed as part of the proxy statement?

A. Yes, it is. There are a few minor changes, mainly of an editorial nature.

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Mr. Smith: Your Honor, I would like to have received in evidence Applicants' Joint Exhibit No. 4 as well as du Pont Exhibit No. 5.

Judge Ullman: Is there any objection?

Mr. Murtaugh: Du Pont 5 is what?

Mr. Smith: Du Pont 5 is the preliminary proxy statement which was marked for identification yesterday.

Mr. Murtaugh: I see. Thank you.

No objection.

Judge Ullman: Received.

(Applicants' Joint Exhibit 4 and du Pont Exhibit 5 were received in evidence.)

Mr. Smith: That is all I have, Your Honor.

Judge Ullman: Is there cross-examination? Mr. Collins?

Mr. Collins: No questions, Your Honor.

Judge Ullman: Mr. Murtaugh?

Mr. Murtaugh: Yes, I would like to ask a few questions.

CROSS-EXAMINATION.

By Mr. Murtaugh:

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Q. Would you tell me what—if you assume you can't have a firm commitment underwritten manner what other kind could there be?

A. I would not think in those cases there would be an underwriting, although its is conceivable that somebody might work out a best efforts underwriting arrangement. I believe there are such things as that although I don't profess to be an expert in that area.

Q. I have read in the field literature about the best efforts type of underwriting, and it is not all that uncommon, is it, to the best of your knowledge?

A. I think it is perhaps a common practice. Not nearly so common as firm commitment underwritten offerings.

Q. So if a person had we will say 20,000 shares of Christiana and came in in April and October and just proposed to sell them on a registered basis through a best efforts underwriter he could go anywhere and do it; is that correct?

A. He would have du Pont shares, sir.

Q. I mean du Pont shares, yes, I beg your pardon. He could go into any house that would handle it and do it. Isn't that correct?

A. Yes, he could. It would be my expectation that the sales made in the April and October registrations in the main would be made through normal stock exchange channels.

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A. It is important because it impacts on the question of what the nature of the transaction is and also is important as a matter of disclosure in making known to our stockholders the material facts on the transaction when we send out our proxy statement.

Q. Well, in connection with that last point, where in the proxy statement is some fact about that made known?

A. There is no statement in the proxy statement on that matter.

Q. Well,—would you read back the answer to the preceding question, please?

(Record read.)

By Mr. Murtaugh:

Q. My only point was you said it was important to make it known on the data and maybe you would like to adjust your answer, or do you want to let it stand?

A. I didn't think I said anything about it being important to make it known except if we have facts to make known.

Q. Isn't the fact that you don't have facts even an important fact to make known?

A. I don't think it is customary in preparing a proxy statement to approach it on the basis of—well, let me say it the other way around. I think the—at least my understanding of what is required and appropriate to put in a

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proxy statement is all the material facts. I would not think and do not think it is necessary to put in comments about absence of facts.

Q. A failure to omit a material fact strikes me as something that rings a bell in my mind. Isn't that an important thing?

A. I don't think we have omitted a material fact. There were no facts to omit.

Q. Did you consider getting anything in the way of a feedback by way of direct inquiry from Christiana shareholders that would be—you already answered you didn't make any inquiries to unrestricted. But as to the restricted shareholders, the investigation consisted of a polling of the directors and an inquiry of them as to whether they knew or knew of anybody that knew? Did they say they would inquire around and report back according to what your information is, or——

A. No. It was just as I said: That the counsel for Christiana asked them if they had any intentions to sell themselves or knew of anyone who intended to sell.

Q. Was that in connection with the application for the Internal Revenue which requires I think a certain percentage—is it 51 percent or something, you have to be sure that 51 percent are going to carry on more or less indefinitely?

A. My general understanding is that you must be able to

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insure Internal Revenue that there will be a substantial continuity of interest. Just what that means in detail under the tax law, I wouldn't know. I am not very familiar with that area.

Q. I see.

Tell us, did you attend any of the meetings of the subcommittee of the du Pont corporation in connection with their sort of semi-formal or formal meetings with each other? They didn't have to be very formal. Did you attend some of those?

A. Yes, sir, I did.

Q. Did this subject of selling of shares by Christiana shareholders come up for further discussion in those groupings?

A. No, I think at the point where—are you speaking of the formal negotiating meetings we had after receiving the——

Q. I have a series of excerpts of minutes of the special committee, and I searched them rather thoroughly and saw no evidence of any mention of this question of market impact by reason of the transaction, and I was wondering if you could supplement those by telling me whether or not that subject was considered by the special committee in their meetings that I have the notations about.

Mr. Smith: Excuse me, Mr. Murtaugh. What special committee minutes are you referring to?

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Mr. Murtaugh: Well, I got excerpts from your office.

Mr. Smith: Could you identify for Mr. Grimes the minutes to which you are referring?

Mr. Murtaugh: Yes, I will identify them here.

I asked Mr. Archie to get me some—were you able to get those? I guess the girl has them right there.

Mr. Gribbon: Your Honor, I might observe that other witnesses who are members of the executive committee and board of directors will be testifying, and Mr. Murtaugh may want to ask them questions relating to the meetings of the executive committee and board of directors, which I think are the minutes in your possession.

Mr. Murtaugh: Yes. I will just ask him generally.

By Mr. Murtaugh:

Q. Was that a subject of further discussion at meetings of the special committee that you attended after the—other than that you have testified to previously?

A. I have participated in discussions with members of our negotiating committee on this subject, yes, sir.

Q. What was the nature of the discussion?

A. The nature of discussions was a review and discussion of the information that I have described that we received from Christiana counsel.

Q. Yes. And that was about the extent of it; is that correct?

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A. Yes, sir.

Q. How about the—no, that's all.

Do you view your position as determining policy or guiding—serving policy in connection with this whole matter?

A. I am the servant, not the guider, sir.

Q. So we can look to others, I presume, to question the reasons for the major scope of the decisions, and you were the executor of the wishes of the other group—higher group, I presume?

A. My function was to assemble and provide information and try hopefully in an understandable form, and following decisions, to do my best to implement those decisions.

Q. Now, generally speaking, do you know of any—can you add anything to the matter of information discussed by the subcommittee at subcommittee meetings or at meetings of the board of directors other than you have testified as to the extent of deliberation or information that you could give us as to the question of possible market impact of the introduction of Christiana shares in the form converted into du Pont shares in the du Pont market?

A. I don't think I have anything I can add to what I have said, sir.

Mr. Murtaugh: O.K. Thank you very much.

That is all.

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Judge Ullman: Mr. Maher, do you have any questions?

Mr. Maher: No questions.

Mr. Osheroff: Just very briefly, Your Honor.

Judge Ullman: Yes.

By Mr. Osheroff:

Q. Mr. Grimes, you testified that you had discussed certain tax consequences with Christiana counsel of the merger as proposed. Is that correct? Prior to that, or during that meeting, had you had occasion to discuss at all the tax consequences of any alternative course of action by Christiana other than the merger with du Pont?

A. We had numerous discussions with counsel for Christiana on the matter of possible tax impact of a Section 333 liquidation, yes.

Q. You did. Could you tell me generally what the nature of those discussions were?

A. I think that initially this subject was opened perhaps at the April 28 meeting that I mentioned awhile ago, or if not, within a matter of a day or so after that.

Q. Pardon me. What date was that?

A. The April 28 meeting, at which we reached the decision to consider a merger. Not at the meeting I attended, but the date on which we announced the decision to consider a merger.

I was generally aware and I think counsel on all sides were generally aware that this was a possible method of

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liquidation that Christiana could consider. It was given considerable attention in the background papers that were available to us on the Delaware Realty and Christiana merger. And we were all uncertain as to what the impact would be, and early on, perhaps by mid-May or maybe earlier, had concluded that this was a matter that Christiana counsel should study and try to develop the best analysis they could as to what the impact might be, so that that factor would be available to all parties to consider.

Q. Well, ultimately were you made aware of counsel's views with respect to a Section 333 liquidation? With respect to its effect on Christiana shareholders?

A. Yes. We had ultimately an opinion that the liquidation in accordance with that section was thought that it might be possible for the range of tax cost that has been mentioned here earlier this week, I believe 30 to 70 million dollars.

Q. My understanding of the testimony—some of the testimony this week is that 30 to 70 million dollar range, while initially thought to be the range, was subsequently dismissed and it was then considered that 333 liquidation was not feasible for various reasons. Is that correct?

A. That is correct. Counsel for Christiana after further discussion following their tentative opinion on the matter with our counsel and further study of the matter reached a conclusion it would not be a feasible thing to

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consider within the time that we were working with this merger.

Q. Were you made aware within any degree of certainty as to what the actual impact of a Section 333 liquidation might be?

A. No, I was not. At one stage I had some understanding, although this is a very complex area that I am not particularly familiar with, as to the problem areas, and it was my understanding that the range of results that might emerge depending upon how those problems might be solved could be perhaps something in the range that had been considered earlier, or moderately higher, or alternatively could be very substantial.

Q. The ranges we are talking about is what might be considered to be profits and earnings of Christiana on which taxes would be due?

A. I think that is at least——

Q. It initially was a 30 to 70 million dollar figure, which at that time, as I understand, the worst impact to Christiana would be in the range of a 2.84 impact.

A. That was the upper range of the tax cost, I believe.

Q. The $70 million limit.

So you are saying that subsequently it was felt that the range might be perhaps in that area, perhaps slightly higher, perhaps considerably higher?

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A. Very considerably higher was my understanding there was a possibility.

Q. When you say very considerably higher, were there any numbers involved?

A. There were no numbers, but I sort of manufactured in my mind a vision of maybe two or three or four hundred million dollars, maybe.

Q. Two or three or four hundred million dollars in taxes or in the determination as to profits?

A. Taxes, yes.

Q. As to taxes. How did you manufacture that number?

A. I just have a vivid imagination, I guess.

Q. Well, that is pretty vivid. But was that—that was not a product of any discussions with anybody?

A. Not at all. That was simply my own thoughts.

Q. Well, I don't deny that a vivid imagination could create that thought, but it would seem to me that the thought might originate from somewhere, some source.

A. Well, it originated, I think, from the understanding I had of the problem areas in regard to the undistributed profits of Christiana related to how the Delaware Realty merger transaction should be treated for purposes

of undistributed profits of Christiana for tax purposes, and moreover, how the distributions of General Motors stock that flowed through Christiana should be treated, and they were

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RE-DIRECT EXAMINATION.

By Mr. Smith:

Q. Mr. Grimes, I believe Mr. Murtaugh asked you whether the Commission had approved the preliminary proxy statement which had been filed. Bearing in mind the Commission policy as to what it actually does with a proxy statement or registration statement, would you indicate whether you received comments on the preliminary proxy material?

A. No, sir, I have not received comments on it.

Q. You would not expect the Commission to formally approve the proxy statement; is that correct?

A. No, I would not.

Mr. Smith: Thank you.

Judge Ullman: You are excused, sir.

(Witness excused.)

Judge Ullman: We will be at recess until 11:30.

(Short recess taken.)

Judge Ullman: On the record.

Mr. Gribbon?

Mr. Gribbon: The applicant du Pont calls Mr. Shapiro.

Whereupon,

IRVING S. SHAPIRO

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

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By Mr. Gribbon:

Q. Would you kindly state your name and business address?

A. My name is Irving S. Shapiro. I am with the du Pont Company, Wilmington, Delaware.

Q. Are you the Irving Shapiro who was a member of the special negotiating committee of the du Pont board of directors with respect to the Christiana merger?

A. Yes.

Q. Who was the other member of that committee?

A. Mr. C. B. McCoy, president and chairman of the company.

Q. What is your position with the du Pont Company?

A. I am a senior vice president, member of the executive committee, a member of the board of directors.

Q. How long have you held those positions?

A. Since September 1, 1970.

Q. What is your education, Mr. Shapiro?

A. I came out of law school in 1941.

Q. What law school?

A. The University of Minnesota.

Q. And what did you do thereafter?

A. I started with the idea that I might be a tax lawyer, but got over that idea very quickly, fortunately, and wound up here in Washington in January of 1942. Spent a year and a

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half with the OPA which was just being organized at that time, and then moved over to the Department of Justice from 1943 until 1951, when I came to du Pont.

Q. In what division of the Department of Justice did you work?

A. I spent my entire period in the Criminal Division. Started out in the Appellate Section, basically writing briefs for the Supreme Court, and after a couple of years, taking on arguments for the Government in the Supreme Court and the various courts of appeals.

Q. And when did your work with the Department of Justice terminate?

A. 1951.

Q. And where have you been employed since 1951?

A. I left Washington in 1951 and joined the legal department of du Pont at that time and became responsible for legal guidance to some of our industrial departments, and beginning in 1952 became involved in the General Motors litigation, and have had some connection with it ever since, among other things.

Q. What position did you ultimately attain in the legal department of du Pont Company?

A. When I left the department I had been assistant general counsel for five years.

Q. When did you leave the legal department?

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A. September 1, 1970.

Q. To take your position on the executive committee?

A. That is correct.

Q. How many members of the du Pont executive committee are there?

A. There are eight. The president and seven senior vice presidents.

Q. And what briefly is the role of the executive committee of du Pont in the operation of the du Pont Company?

A. Well, there are two different ways of going at it. In one sense the executive committee acts in the place of the board between board meetings. Viewed from an operating sense, our company business activities are divided by industrial departments. The head of each department is a vice president and general manager. He has responsibility for running the businesses under his jurisdiction. He in turn reports to the executive committee and the president.

Q. And do the individual members of the executive committee have responsibilities with particular phases of the du Pont Company's operations?

A. Yes. Each of us have an assigned liaison responsibility. The authority to run the businesses assigned to each department resides in the head of the department. But each of us functions in a liaison capacity between the heads of those departments and the executive committee, and

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essentially that says that we have an obligation to be sure that we know what is going on in those departments and that we are transmitting to those departments the policy views of the top management of the company.

Q. For which departments of the du Pont Company do you, Mr. Shapiro, have the liaison responsibility on the executive committee?

A. Well, I have, for obvious reasons, the legal department, our treasurer's department, our fabrics and finishes department, our secretary's department, and our economist's—chief economist's office.

Q. You have then both the legal and the treasurer's department under your liaison responsibility?

A. Yes, I do.

Q. You mentioned in relating your experience with the legal department of du Pont Company that you had been involved in the General Motors litigation. Let me ask you, what was the extent of your involvement in the litigation which eventuated in an order requiring du Pont to divest itself of its General Motors stock?

A. In the part of the litigation that had to do with the merits of the Government's claim, the alleged violation of the antitrust laws, I was one of a multitude of lawyers working on various segments of the case that needed attention. I was part of a team that assembled the evidence and lined up

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the witnesses for one aspect of the trade relations evidence that was given in Chicago.

Q. Now, taking the next inning, once it had been determined that there had been a violation of the Clayton Act and the question was what kind of an order should be entered by the court, what was your responsibility?

A. At that point in time I was given full responsibility within du Pont for working on those proceedings in conjunction with the guidance of our general counsel. And he and I spent—we were in Chicago for the full duration of those hearings and participated in them with our outside trial counsel.

Q. Did you then participate in developing and presenting the position of the du Pont Company with respect to the General Motors divestiture?

A. Yes, indeed. As a matter of fact, now that I think about it, even before we got to Chicago I worked extensively with one of your partners in interviewing financial houses, investors, and attending the meetings of our stock-

holders and of General Motors stockholders, all in preparation for the Chicago proceeding.

Q. Now, in conjunction with the divestiture, do you recall that there were also Congressional hearings relating to various proposals for tax legislation?

A. Yes, there were.

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Q. To what extent, if any, did you participate in developing and presenting the position of the du Pont Company with respect to the legislative proposals regarding the General Motors divestiture?

A. I was in that picture from the day it started until the day it ended.

Q. Who was the principal representative of the du Pont Company in those proceedings?

A. You are talking now about the proceedings to get legislation?

Q. Yes.

A. The principal spokesman for the du Pont Company was Mr. Crawford Greenewalt, who was then president of the company.

Q. Was Mr. McCoy involved in those proceedings?

A. Not at all.

Q. Now, I direct your attention to the proceeding in Chicago having to do with the kind of an order that the court should enter to remedy the violation of Section 7. What was the program of the Antitrust Division that was put forward which du Pont opposed in that litigation?

A. The Antitrust Division proposed a decree which in essence said the following: du Pont must divest itself of 63 million shares of General Motors stock by transferring the shares to a trustee; the trustee in turn would sell the

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shares allocable to Christiana and would distribute in ten annual installments the shares allocable to the other shareholders of du Pont.

Q. Now, did du Pont oppose that program of the Antitrust Division?

A. That is an understatement. Yes.

Q. In both the District Court and the Supreme Court?

A. That's right.

Q. And what, Mr. Shapiro, was the basis of du Pont's opposition to that program?

A. Let me say it this way. The decree that had been proposed exacted nothing from the du Pont Company. Once the Supreme Court had ordered du Pont to divest the shares, that was all that would be taken from the du Pont Company. What was left was the impact of the divestiture on our stockholders. And the entire battle in Chicago, and then again to the Supreme Court, and then again on the Hill, was to seek to ameliorate the consequences that would fall on our stockholders. And the consequences essentially came from the fact that the stockholders would be forced to receive the General Motors shares which they had already indirectly owned, and when they received them they would be taxed as though they were receiving a dividend. The financial consequences of that were enormous, and the expectation was that stockholders would have to raise capital to pay the taxes, and this in turn

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would lead them to the market to sell in wholesale quantities the shares they had received, and this would come to the market on top of the sales being made by the trustee of the shares allocable to Christiana.

And to put the frosting on the cake, the problem was not one of one-year or two-year action, but a court order that would require this kind of activity in the market place year in and year out for ten years with everybody in the financial community knowing that the General Motors shares were coming.

Q. Now, did du Pont take the position that the program advanced by the Antitrust Division would have a significant market impact upon the General Motors stock?

A. We did. The testimony and the briefs both came to the argument that under the Government plan there would be market impacts in the range of, as I recall it, anywhere from 20 to 30 percent, depending on circumstances.

Q. Was that as a result merely of the sales of the stock, or was it the combined result from the Government program?

A. It was the result of a divestiture order calling for a ten-year program of divestiture. The overhang that came from that plus the sales by the trustee plus the disorganized sales by stockholders who would have to raise capital to pay taxes.

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Q. Turning now to the Congressional hearings with respect to various tax proposals, approximately during what period were those hearings held?

A. The legislative effort, as I recall it, started after the second Supreme Court decision. There were two sets of hearings. I would guess that the first were probably in '59 or '60 and the second in '61, but I am not absolutely certain of the precise dates.

Q. At the time of these hearings was the program of the Antitrust Division which you have just described and which du Pont opposed still in the picture?

A. It was not. At least in some respects. As the case came to the Supreme Court on the second review of Judge LaBuy's decision, the Antitrust Division abandoned the decree it had advocated before Judge LaBuy, and instead argued to the Supreme Court that there ought to be divestiture over a ten-year period but that it had no interest in the means of divestiture, and indeed in that proceeding, as I remember it, the Antitrust Division suggested that it would be nice if Christiana was merged into du Pont and suggested to us the tax route for accomplishing that.

Q. Pardon me?

A. I say the Antitrust Division in its brief to the court suggested that one of the means by which the divestiture problem could be accomplished encompassed having Christiana

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merge itself into du Pont, and the Government brief suggested the tax procedure to accomplish that.

Q. They suggested a tax-free merger of the two companies?

A. That is correct.

Q. Well, let me digress a minute. Was consideration given to such a merger of du Pont and Christiana on a tax-free basis at that time?

A. I understand that it was.

Q. It was not consummated.

A. It was not. Christiana was unwilling at that time to go out of existence.

Q. And do you know what kind of a price it paid to stay in existence?

A. Well, let me answer you in this way: All the consequences that we are talking about now in terms of benefits to Christiana would have been available to it then if

it had chosen to have the merger, and in addition, it would have saved somewhere in the neighborhood of 75 to 100 million dollars in taxes that it subsequently paid for receiving the General Motors shares.

Q. Are you privy to the reasons why Christiana did not elect to propose a tax-free merger?

A. I am not.

Q. Now, directing your attention to the Congressional

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hearings, what was the position that the du Pont representatives urged in those hearings with respect to the proposed legislation?

A. Well, let me back up just one step.

As the case came out of the Supreme Court the Court said there must be divestiture in a ten-year period but du Pont is free to do it as it pleases. And at that point we reexamined our situation and worked out a three-pronged divestiture plan that we were prepared to follow in the event that remedial tax legislation was not obtained. And the plan essentially was this:

First, that instead of paying strictly cash dividends, we would pay out about 15 million shares of General Motors in dividends in lieu of cash.

Secondly, that we would set up an exchange program in which people could turn in their du Pont stock and get equivalent value in General Motors shares.

And, third, the expert guidance led us to conclude that if we ran those two programs we would still have to sell in excess of 35 million shares of General Motors in the market.

Q. Over what period of time?

A. This is over a ten-year period.

Q. Did du Pont urge that this modified divestiture program that you have just described would have an adverse

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impact on the market value of General Motors stock?

A. We did. We went up on the Hill, testified both before the Committee on Ways and Means and before the Senate Finance Committee that by our estimate that plan would generate from 330 to 350 million dollars in tax revenues depending on values of General Motors shares over the period, and that the expectation was that the receipt of General Motors shares by our stockholders in lieu of cash dividends would precipitate them into the marketplace to get cash both for living expenses and their other uses they have and to pay taxes.

Q. What tax did you understand would be due upon the receipt of the General Motors shares distributed as dividends?

A. It would be treated as an ordinary dividend, it would be the ordinary income tax.

Q. I see.

A. The rate at that time was—went up to 81 percent, as I remember it. And I should add just as a footnote that we had done a survey of the stockholders and we knew that the average tax rates of our stockholders were in the range of 50 to 60 percent.

Q. So I interrupted you there. You were saying that you did urge that the program—the modified program would have an adverse impact first because of the dividends?

A. We urged that in both houses of Congress and various

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experts testified as to how much of an impact it would have depending on various circumstances. Both committees of Congress were persuaded by the testimony.

The Antitrust Division of the Department of Justice ultimately supported the legislation, and President Kennedy was persuaded and signed the bill.

Q. Now, Mr. Shapiro, I would like to ask you based upon your knowledge, understanding, and participation in the du Pont position with respect to the General Motors divestiture, when you came to consider the proposal that Christiana and du Pont merge did you see any issues in the du Pont-Christiana merger that bore a similarity to those problems which you were facing in the General Motors divestiture?

A. None whatsoever.

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Q. Would you explain why you feel the two situations are not comparable?

A. Well, let me say that as I saw it then and as I see it now, comparing these two situations, to me, at least, is comparable to comparing a BB gun to the hydrogen bomb. In the General Motors situation we had a compulsory order that controlled everybody's activity. People were not in a position to protect their own interests in the exercise of their own discretion.

The financial community to a man described the proposals that were being considered as unknown before in American financial history. And that view of the situation obtained all the way through the court. Judge LaBuy wrote an opinion to that effect; it obtained in Congress. And as I said, President Kennedy was persuaded enough to sign the bill.

The case we are talking about here this week it seems to me is just a totally different animal. There isn't any compulsion of any kind on anybody. Each investor is free to do what he wants to do to suit his own best

interests. No one is forcing him to take shares to the market. He obviously is not going to go to market and drive the price down because he is driving down his own values when he does it. So that it strikes me that the case we have before us here is the equivalent of what goes on in the American

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business world every day of the week.

For example, I read in the paper this morning that the Dow Chemical Company had decided to have a stock split. I suspect, without knowing, that they did not have a market analyst come in and tell them what the market impact would be of a stock split. It is a commonplace occurrence.

Another item said that 8 percent of the shares of Alcoa were coming to the market in a secondary. Again, it is a standard kind of a business transaction. Whatever impact it has is temporary and local, and obviously doesn't have a long-term effect on the Alcoa Company.

Q. I take it from your testimony that in the General Motors divestiture matter the income tax consequences were an important factor in the forming of the position of the du Pont Company. Don't those same consequences obtain here?

A. They do not.

Q. Why is that?

A. If this exchange takes place under the terms that have been bargained out, the Christiana shareholders will turn in their shares of Christiana and have shares that have the name du Pont on it in place. They will assume for their du Pont shares the same basis they had for the Christiana shares. The transaction will be tax-free. There will be no need for them to raise capital because

of the transaction. They will simply wind up owning directly what

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they owned indirectly, just as in the General Motors situation. The difference is simply that there you had a taxable transaction and here you have a tax-free one.

Q. Now, in reporting your recommendations to the du Pont executive committee and board of directors with respect to the du Pont-Christiana merger, did you feel it necessary or appropriate to warn the board of directors and executive committee members of the consequences of the General Motors divestiture?

A. I am not sure I follow you. Are you talking now——

Q. On your du Pont-Christiana matter. Did you——

A. Are you asking whether I felt it necessary to advise our people of the consequences of the General Motors divestiture in the early period?

Q. No, now. In connection with the du Pont-Christiana proposal.

A. Yes. But in connection with the du Pont-Christiana proposal I felt no sense at all in talking to our people about the market consequences of the General Motors divestiture. The two transactions are totally dissimilar.

Q. For the reasons you have just described?

A. That is right.

Q. Now, there has been discussion in this case of certain tax claims made by Christiana growing out of the General Motors divestiture. Are you familiar with those

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claims?

A. Yes, in a general way.

Q. Was it necessary for you to form some judgment about them in connection with the proposed merger?

A. Yes, indeed.

Q. Are you familiar with the principle that is being urged by Christiana in making those claims for a refund in income taxes?

A. Yes.

Q. What do you understand that principle essentially to be?

A. Christiana received from du Pont three blocks of General Motors shares in the divestiture proceeding that finally eventuated. On each of the distribution dates it had to determine for tax purposes the value of the shares it received. It obtained the advice of Morgan Stanley and Merrill Lynch on the valuation question and used that as a basis—as I remember it, they used the average of the two sets of advice as a basis for filing their tax return. In arriving at the numbers which were used, the two financial houses went at it in terms of testing what the block of shares of General Motors would sell for on the distribution date given a willing buyer and a willing seller and cash as the consideration. They added to that the costs of the marketing, and that is how they came to their valuation

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answer.

As I started to say before, Christiana used those answers in filing its tax returns, a dispute arose with the Internal Revenue Service over the matter, they paid the deficiency and sued for a tax refund. In the course of the litigation which ensued, both sides mounted their experts, and at this point in time the Government has three experts,

Christiana has two. Two of the Government experts said there wouldn't have been any market effect and therefore there was no justification for blockage which was the term that I understand the tax people use for this. The third Government expert made an analysis and determined that there would be some market effects but less than those determined by Morgan Stanley and Merrill Lynch, and the parties are haggling about how much the shares actually would have sold for on the particular days involved.

Q. In your approach to and consideration of merger terms between du Pont and Christiana did you see any application of this blockage principle that is involved in the Christiana tax case?

A. None whatsoever. We were not purporting to buy Christiana shares for cash; we were purporting to trade the underlying assets of Christiana for du Pont shares, and that essentially says we are trading du Pont shares for du Pont shares. It would have been silly in practical terms to

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go through a routine of finding a market value for du Pont shares and apply blockage principles when we were expecting to transfer fungible paper.

Q. You end up transferring fewer du Pont shares than you receive back for cancellation, is that right?

A. 188,500, which in my book is a substantial number.

Mr. Gribbon: I should like to mark for identification as Applicants' Joint Exhibit No. 2 a communication from Irénée du Pont, the president of Christiana Securities, to Mr. C. B. McCoy, chairman and president of the du Pont Company, dated April 20, 1972.

(Applicants' Joint Exhibit 2 was marked for identification.)

By Mr. Gribbon:

Q. Are you familiar with the document that has been identified as Applicants' Joint Exhibit No. 2?

A. Yes, I am.

Q. Will you tell us what it is, Mr. Shapiro?

A. It is a letter from the president of Christiana Securities Company, Mr. Irénée du Pont, Jr., to Mr. McCoy as chairman and president of the du Pont Company, and it proposes examination of the question of whether the two companies ought to be merged.

Q. Was this communication, so to speak, the kick-off of the consideration of the merger?

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A. Yes, it was.

Mr. Gribbon: I ask that Applicants' Joint Exhibit No. 2 be received in evidence.

Judge Ullman: Is there any objection? It is received.

(Applicants' Joint Exhibit 2 was received in evidence.)

By Mr. Gribbon:

Q. Mr. McCoy promptly brought the letter of April 20 to your attention and to that of the other members of the executive committee, did he?

A. Yes, indeed. As I remember it, he advised me promptly after he received it, and at the next meeting of the executive committee he advised the committee as a committee.

Q. Did you, Mr. Shapiro, read Mr. Irénée du Pont's letter of April 20 as an indication that there would be substantial sales of du Pont stock by the Christiana share-

holders following a merger if the merger were to be consummated?

A. Of course not.

Q. Why not?

A. Mr. du Pont was speaking for a group of people who have devoted their lives to the building of the du Pont Company over the years. Their predecessors, their ancestors.

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It is hard to think of any group who had a greater attachment to the du Pont Company than this group of members of the du Pont family. And it was inconceivable to me that they had some intention on April 20th, 1972, to suddenly liquidate their interest in the du Pont Company, one that had gone on for 170 years, and move to something else.

And so one had to look at this and say what is going on, and when you answered that question you couldn't convince yourself by any stretch of the imagination that the members of the du Pont family wanted to get out of the du Pont Company.

Q. Did you have any other basis for your belief as I believe you have just stated, that substantial sales of du Pont stock were not contemplated?

A. Well, there are a number of ways of dealing with that. In the first place, it seems to me fundamental, given the integrity of the man involved, that if they had any interest in moving du Pont shares to the market place, that would have been disclosed immediately.

I truly can't conceive of men of this quality having some underhanded scheme to market shares in the market place without disclosing it to the management of the du Pont Company.

So that is a starting point, it did not occur to me at all that this would happen.

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I must say that in the light of my General Motors experience, the subject of market impact passed through my mind, but I dismissed it as not a serious consideration.

Q. Were any inquiries made, to your knowledge, as to whether substantial sales were in contemplation?

A. Yes, indeed. It was not enough that I was convinced in my own mind that this was not some secret, diabolical plan. Promptly after our executive committee appointed a negotiating committee we convened a meeting of all the counsel, the financial—not the financial people, the in-house financial people, but at that point we did not have outside financial advisors involved. And I sat in on the meeting. It was on April 28. And each side came to the meeting with a list of items that it wanted to get on the table to be sure that various kinds of work were undertaken to proceed with the examination of the question. And one of the questions that was discussed at that time in a formal way was whether there was any basis for expecting that this was a liquidation of the du Pont family interest in the du Pont Company. And at that meeting, Mr. Gemmill, speaking for Christiana, was quite explicit on the point that it was not. And as I remember it, when the SEC experts around the table started talking about various ways of dealing with possible sales, he assured them that it was an academic question: there was no interest

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on the part of his clients in moving out of the du Pont Company.

There were subsequent developments, but that was the first step.

Q. This April 28th meeting which you attended was not a meeting of the negotiating committee of the two companies?

A. No. No, quite the contrary. This event developed unexpectedly from my standpoint, and I had plans to be abroad beginning the first week in May, and I wanted to be sure that we got the staff work moving while I was gone. So we assembled everybody in Wilmington to see how we could block out the various assignments that needed to be undertaken. And as I remember it, we had acted on Wednesday of that week, this was a meeting on Friday morning, and the Christiana board was to meet that afternoon to take action from its standpoint.

Q. You were the only one of the negotiators present at that meeting, is that correct?

A. That is correct.

Q. Did you during the course of the consideration of the Christiana merger talk directly with any of the directors or major stockholders of Christiana?

A. I assume you mean about the merger?

Q. About the merger, yes.

A. No.

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Q. Was that by design?

A. This is by design. Counsel on each side advised the parties to not carry on discussions between themselves but to work through counsel on the premise that even though everybody knew each other, it was preferable to make this as much an arm's-length negotiation as we possibly could under the circumstances.

Q. Leaving aside the meetings that you subsequently had with the special negotiating committee of Christiana, did any member of the Christiana board or any major

shareholder ever suggest to you in any way what he thought the right terms for this merger should be?

A. No.

Q. Back now to the possible impact on the market value of du Pont shares as a result of consummating the merger. Was that subsequently discussed with your financial advisors?

A. It was. Both with Morgan Stanley and First Boston.

Q. And what was their advice?

A. Neither company saw any serious or prolonged market impact. I think both recognized that there could be situations from time to time, depending on the number of shares that people might want to sell, where you could have a dislocation for a few days, but nothing that would have any permanent or lasting impact on the stock.

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Q. Now, directing your attention to the occasion in mid-July when the merger was presented—the merger terms were presented to the board of directors of the du Pont Company and on which occasion they received tentative approval. What discussion was there at that meeting of any possible impact on the market value of the du Pont shares?

A. Let me back up one step again.

Prior to that meeting—well prior to it, we sent to all of our directors the reports of the three financial houses so that they could be studying the financial data and have their own understanding of the transaction. Two of those reports, as I remember it, addressed themselves to the question of market impact.

At the directors' meeting itself, my recollection is that I made a brief presentation of the merger proposal from a series of notes I had jotted down on a yellow pad, and my

recollection is that I simply went through the various financial analysts' documents and jotted down titles to remind me of things to talk about. And I would assume, although I have to concede that I don't have a very clear recollection of it, that the market impact discussion in the Kidder, Peabody and the Morgan Stanley report was mentioned. It did not—in any event, the subject did not generate any degree of interest among the directors.

Q. Was it in your own conception of the transaction

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a factor that deserved prolonged discussion?

A. Not at all. I think it was a de minimis item.

Q. If there had been discussion of the possible market impact at the board meeting, would it have been normal for the minutes of the board meeting to have reflected such discussion?

A. No.

Q. Why not?

A. The minutes would have simply reflected that a presentation was made with respect to a proposed merger with Christiana Securities Company, and they would show a resolution adopted by the board.

Q. Following tentative approval, or approval in principle by the board of the merger terms in mid-July, did you make any subsequent re-examination of this question of possible impact on the market value of du Pont shares?

A. We had another round in this connection with Mr. Gemmill. And again I am not sure whether it was a discussion between myself and Mr. Gemmill or whether it was between Mr. Grimes and Mr. Gemmill and Mr. Grimes told me. But in any event, I had been advised by the end of July that the matter had been seriously canvassed and there was no plan, secret or otherwise, in the du Pont family to move out of the du Pont Company and their

holdings of du Pont shares. That is where it stood until the proxy material was prepared.

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And in that connection, Mr. Gemmill's people worked very carefully for a long period of time with Mr. Grimes and his staff, and I saw drafts of proxy materials. There was no indication in any of that proxy material of any plan to dispose of shares.

I know Mr. Gemmill well enough as a lawyer to know that if his clients had any such plan he would have insisted that the proxy material reflect the plan. Otherwise, the exposure of his clients would have been enormous.

Q. Were there particular passages in the Christiana proxy material that led you to the conclusions you have just expressed with respect to possible sales?

A. It was not that there were passages that dealt with the subject. It was the absence of language that persuaded me that what I had heard before was accurate.

I would have assumed, just as a matter of being a good set of lawyers on the other side, that Mr. Gemmill and his associates, who had worked very diligently in preparing the proxy material, would have insisted that their clients disclose any plans that they had. Otherwise, as I said, their exposure in terms of dollars is unbelievable.

Q. Were you aware that the Wilmington Trust Company was the holder of a substantial portion of the Christiana shares?

A. I came to find that out at some point along the

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way. I had not known it or focused on it in the early stage of this affair.

Q. Were you advised at any time as to the intentions of the Wilmington Trust Company, if any, with respect to the du Pont stock that would be received in the merger?

A. Yes. Again the advice came directly or indirectly from Mr. Gemmill, and in this case I think it came directly, that he had consulted with the Wilmington Trust Company and that they had no plans to liquidate their holding of du Pont stock, either the shares they now held or the shares they would get in the merger. Subject, as Mr. Grimes indicated, to whatever requirements they faced in their fiduciary capacity.

Q. Following the meeting of the board of directors of the company in July, was there a subsequent occasion on which the possible impact on the value of du Pont stock as a result of the merger was discussed?

A. At the board level, I take it you mean.

Q. Yes.

A. Yes, indeed.

Q. What was the occasion for that discussion?

A. Well, let me start this way: each month at our board meeting Mr. McCoy had a practice of having the—he advised the board on the current status of negotiations and plans depending on the various stages. There came a month

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in which I had to advise the board that objections to the proposed merger terms had been filed with the SEC, and I did, and the board had a good deal of curiosity as to the nature of the objections and who the people were who were objecting. And we had a rather fulsome discussion of the subject at that time. I think it was the November meeting.

Q. And what was the essence of your report to the board on the occasion of that meeting?

A. I told the board that I had read the objection of Mr. Murtaugh; that I had re-examined the subject of market impact in the light of the facts we had, in the light

of the financial advice we had, and that in my view the objection was frivolous.

Q. Was there any dissent from the view you expressed?

A. There was a fair amount of discussion as to why Mr. Murtaugh was raising the issue and why Mr. Collins had raised an objection, and I expressed views as to that which I would prefer not to deal with today.

Q. Was there any member of the board of directors who expressed any difference from your assessment of the matter?

A. Not at all.

Q. Are you generally familiar with the proposed proxy statement that has been marked in this case as du Pont Exhibit 5?

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A. As I said, I read it—read drafts when it was being put together, and I read it when it was finished. I have a general familiarity. I would not purport to be able to tell you what is on each page.

Q. Have you any reason to believe, Mr. Shapiro, that in connection with this matter of possible market impact that there is any failure to state a material fact or any misrepresentation in that proposed proxy statement?

A. Obviously not. Otherwise we would have put it in. But let me add, if, for example, the staff of the Securities and Exchange Commission had a comment on this subject, they said we think you are wrong, you ought to say something about it, then it would be added.

The point of the proxy material is to tell the stockholders as much as we can about material facts so that they can make an informed judgment. We have no desire to hide from the stockholders any fact.

Q. Based upon your knowledge, you don't feel that there is any materiality as of this time in talking about the market impact of this merger?

A. In my view it is a Murtaugh effect and is de minimis consideration.

Mr. Murtaugh: I didn't quite get the—would you repeat that answer?

The Witness: I said in my view it is a Murtaugh

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effect and a de minimis consideration.

By Mr. Gribbon:

Q. Do you consider that the proposed merger with Christiana on the terms that have been agreed to and submitted to this Commission is in the best interest of du Pont and of the non-Christiana shareholders of du Pont?

A. I am absolutely convinced of it. Without any reservations.

Q. Would you explain the basis for the view you have expressed?

A. There has been a good deal of testimony all week about benefits to either side in this transaction, and there is not much point in repeating what everybody else has said.

I would prefer to deal with what appeals to me as the central consideration from the du Pont standpoint, and that is the dispersal of a block of 28 percent of du Pont stock in the hands of Christiana. And I say that with a fair amount of diffidence, because, as a matter of history, Christiana has contributed greatly to the success of the du Pont Company over the years. Men such as Pierre S. du Pont, Lamont du Pont, Irenee du Pont, Walter S. Carpenter, Jr., Lamont du Pont Copeland, Crawford H.

Greenewalt have all been giants in building the du Pont Company, and they have also been connected with Christiana. So that as a matter of history, the contribution is enormous.

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When you look to the future, however, it seems to me we have a totally different picture. And I think this must have underlain the consideration of the Christiana board when Mr. du Pont's letter was written.

As these men, some of whom are now gone and others who are now in the latter years of their lives, looked to the future, it strikes me that they must have asked themselves who is going to be managing Christiana in the years to come and what skills do they bring to understanding the chemical industry and the du Pont Company. And having examined it that way, I suspect they must have concluded it is unwise to deal with uncertainty for the future. But whatever their thinking may have been, from my standpoint the critical consideration for the future of the du Pont Company—and I am talking about those who follow us in management, rather than the current management—is that there not be a block of 28 percent of du Pont shares in hands of people who have no familiarity with the chemical business and with the du Pont Company in its detailed operations.

And it is the elimination of that kind of an uncertainty for the future which seems to me so overbearing in importance that the merger is the greatest news that I can think of for the du Pont Company.

Q. Aside from the effect or possible effect on the management of the du Pont Company as you have described,

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would the continued concentration of this 28 percent block pose any sort of threat to the value of the balance of the du Pont shares?

A. If you let your imagination run, you can conceive of situations in which it might. All that I am saying today is that I don't know what the future will bring, and I think it is part of my duty as a senior vice president of the du Pont Company to do whatever planning I can to avoid unforeseen risks of this kind in the future.

Q. You do understand, do you not, Mr. Shapiro, that there are significant financial benefits that will flow to the stockholders of Christiana if the merger is consummated?

A. I understand they will get—they will hold directly the du Pont shares they now own indirectly and that is an advantage to them. Just as in another context we regarded our stockholders as having an indirect interest in General Motors.

Q. And made every effort to try to get those shares to them on a tax-free basis.

A. That was the point of my comment earlier; that we devoted many of our lives and our resources to trying to assist those stockholders at that time to get directly what they held indirectly without having their assets confiscated.

Q. You are also aware that upon consummation of the merger there will be an elimination of the present

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inter-corporate dividend tax that Christiana pays?

A. Yes, indeed.

Q. Which would be a financial benefit to the stockholders?

A. It would.

Q. Now, in approaching the matter of merger terms, did you—or do you believe that you were entitled to demand on behalf of the non-Christiana shareholders of du Pont a substantial participation in these benefits?

A. The answer is no.

Q. What is the basis for that answer?

A. As I indicated before in connection with the discussion of the General Motors shares, I would come to this situation the same way. As a director of the du Pont Company, I would regard myself as having a fiduciary duty to all of our stockholders. In this case there are two classes: one, Christiana, and the remaining shareholders. And it seems to me that my object in management is to see to it that the interests of the du Pont Company are protected. To the extent that I can facilitate the stockholders of Christiana getting directly what they own indirectly, I think that is a benefit ultimately to the du Pont Company as well. But primarily, my concern would simply be that if their interests are to be facilitated, it ought not to be at the expense of the du Pont Company and its shareholders.

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Q. Did the financial advice that you sought from two different advisors alter your view as to the propriety of the non-Christiana shareholders attempting to participate in these benefits to flow to Christiana shareholders?

A. No, it confirmed it. What we did essentially was to first of all bring to it a businessman's viewpoint of the transaction and then seek to get the best financial advice one could get and the best legal advice we could get to test what our own thinking was in terms of, A, being able to get the appropriate tax ruling, and B, being able to

get the appropriate exemption order from the Securities and Exchange Commission.

Q. Did the legal advice alter your view as to participation in those financial benefits?

A. No. It confirmed it.

Q. In your view, sir, was the merger sufficiently advantageous to du Pont that you would have favored it even if there were no immediate financial benefit to the non-Christiana shareholders of du Pont?

A. Yes, indeed. As I tried to say earlier, I regard the dispersal of the block of stock as of enormous value to the du Pont Company and its stockholders, management and employees of the future. The question of the discount is one of these fringes that becomes necessary in order to be able to demonstrate values. If I could put a dollar

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value on the dispersal feature, I think the discount would be an academic matter. But since people—and here I really am thinking of many of our employees who have no grasp of management in this sense, no grasp of the importance of getting this block dispersed—those people would not understand clearly why this kind of a transaction was being entered into, and so I gather this is customary in these transactions, and we did it here. We negotiated an inducement factor to demonstrate to people that there is a dollar value in addition to this other value I have been talking about.

Q. In your consideration of the merger, what assumption, if any, did you make as to whether there were available to Christiana alternative methods by which it could get its du Pont holdings directly into the hands of Christiana shareholders?

A. I started and I remained with one basic assumption: that Christiana does not have to have a merger unless

it can get terms that are satisfactory to it. It can continue to stay in business as it has for 50 years. And all the talk about other alternatives was totally unimpressive to me.

From our standpoint, we were anxious to have the merger for the reasons I have outlined, and I didn't want them to change their mind and decide they wanted to stay in business.

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Q. There has been considerable testimony and reference in the advisors' reports to the possibility that Christiana might be able to utilize Section 333 of the Internal Revenue Code to distribute its holdings of du Pont stock to its shareholders with relatively modest tax as these matters go, $30 to $70 million. What did you understand to be the significance of that possibility in the negotiations? What part did it play?

A. Well, 333 was suggested I think initially by the Christiana people as a possible alternative that they had. We considered it, and the more we considered it the less we thought of it as a realistic alternative. And we finally concluded it was a bargaining ploy being used for the purpose of keeping the discount as low as possible.

We satisfied ourselves in our own thinking that the mechanism of 333 which involved getting consents from 80 percent of the outstanding stockholders on an individual and corporate basis was an impractical mechanism with a company involving 8,000 shareholders, and through the work of the tax lawyers on both sides it became evident after a while that there were insoluble tax problems until you actually had such a distribution and the IRS went after the recipient of the stock and tried to assess additional taxes. Then the problems could be resolved in the various judicial tribunals.

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Under those circumstances, we dismissed it as a serious matter, and I am clear in my recollection on this: that the very first item at the first negotiating session I leaned across the table and asked for an admission from the other side that they were abandoning 333 as having any significance, and I got the admission.

Q. What effect did the elimination of 333 as a feasible alternative have upon the terms that du Pont suggested to Christiana?

A. We had agreed among ourselves, that is, Mr. McCoy and myself, on the terms that we wanted to bargain for. The number was higher than the top of the range suggested by Morgan Stanley, which had been a joint advisor to the two companies. It was higher than the top of the range that Kidder, Peabody had announced at the June 30 meeting. And we were anxious to destroy the 333 argument so that we could justify getting a higher discount as a part of the bargain.

Q. By the way, there have been some suggestions made in examination of the financial people that they are not going to be paid unless this merger goes through. Will you state the du Pont Company's position with respect to the payment of those financial advisors?

A. In our 170 years we have never gotten anything for free and we don't expect to get it from these people.

And I would add the lawyers to that category.

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Q. In your merger negotiations, Mr. Shapiro, what consideration did you give to the market value of Christiana shares?

A. We were conscious of it, but it was not a factor in considering the merits of the deal that was being negotiated.

Q. Why wasn't it a factor?

A. We were not interested in buying Christiana shares as that. We were interested in getting du Pont shares and returning du Pont shares.

Q. Are you now or have you at any time been an officer or director of Christiana?

A. Never.

Q. Do you own stock in Christiana?

A. No.

Mr. Gribbon: I would like the record to show at this point, Your Honor, by reference to pages E-1 and E-3, which relate to the holdings of du Pont directors, that Mr.—this is of du Pont Exhibit 5, I am sorry—that Mr. Shapiro has a significant equity interest in the du Pont Company and no interest in Christiana.

By Mr. Gribbon:

Q. Is it your considered judgment that the terms that have been agreed to for the merger of du Pont and Christiana are fair and reasonable to the du Pont Company

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and to the shareholders of du Pont other than Christiana?

A. It is, and I would include in that category the employees of the du Pont Company.

Q. Have you in negotiating this merger on behalf of du Pont been motivated in any respect by a desire to confer benefits upon Christiana shareholders?

A. No.

Q. Do such benefits as may flow to the Christiana shareholders as the result of the consummation of the merger constitute any disadvantage, financial or other-

wise, to the du Pont Company or to its shareholders other than Christiana?

A. They do not. And let me say again that if I could find any significant disadvantage—well, I will withdraw the word "significant." If I could find any disadvantage to the du Pont Company from this merger, I would not be supporting it.

Mr. Gribbon: No further questions, Your Honor.

Judge Ullman: Mr. Collins, do you have questions?

Mr. Collins: Yes, Your Honor.

Judge Ullman: Will you proceed.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. Shapiro, does the Christiana Securities Company control du Pont Company?

A. Would you tell me what you mean by control?

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Q. I am simply asking you, in your opinion, does it control—

A. Mr. Collins, the problem is this simple: everybody all week has used the word "control" as though it was a word with a fixed meaning. I suggest to you that control is a fluid word with many meanings under different circumstances. I am prepared to answer your question if you tell me what you mean.

Q. Well, sir, in last year's proxy statement sent out before the last annual meeting, I believe that there was a statement in that proxy statement to the effect that the du Pont Company denied that the Christiana Securities Company controlled it. Are you familiar with that?

A. Yes, indeed.

Q. Now, do you support that statement?

A. I do. I approved it before it went out.

Q. Now, when the du Pont Company first contacted The First Boston Corporation to represent it in this merger negotiation, was there any discussion of what fee The First Boston Corporation would receive?

A. Not that I know of. I was not present, but I would be surprised if there was. We assumed we would pay a fee, and we know that investment bankers do not come cheaply.

Q. Do you believe that it is good business practice

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to enter into a transaction before you know what the cost of that transaction and what the cost of those services are going to be?

A. It depends on the transaction you are talking about. If I am going to buy merchandise for my plant, of course I have to know the cost. If I am going to retain a lawyer, I very seldom ask him to name the fee before he performs his service.

Q. About 20 years ago I believe that the du Pont Company had a policy that the company could not engage in any transaction that was going to cost more than $300,000 without the express approval of the finance committee. Are you aware of that?

A. No, sir.

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Q. At the present time—

A. I am sure that there was a policy that defined jurisdiction between the executive committee and the finance committee with respect to capital appropriations. But I don't know of the policy you have described.

Q. Then do I understand you to answer my question that if you were going out to buy some equipment or to buy a plant, you would understand clearly before the deal was consummated that you would know what you were going to pay for it?

A. What I said was if I were going out to buy raw material for my plant, I would want to know the cost of the raw material before I bought it. I distinguished that from buying services of professional people and said if I were going to retain a lawyer it would be very unusual for me to ask him about his fee before he performed his services.

Q. Yes, sir.

A. And I stick with the same answer.

Q. Now, when the du Pont Company engaged Morgan Stanley to advise it in this merger negotiation—and you were among those who selected Morgan Stanley?

A. Yes, indeed.

Q. Were you aware of the long-standing relationship that Morgan Stanley had had with the du Pont Company?

A. And with Christiana.

Q. And did you believe that Morgan Stanley had made a

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good many profits as the result of this business relationship with du Pont?

A. I certainly hope so. I wouldn't want anybody to do business with du Pont and not make a profit.

Q. And do you believe that it was better to engage a firm that had had this long-standing relationship and had made these profits with du Pont—it was better to select that firm than to select a firm that had had no business relationship with du Pont in the past?

A. No, I wouldn't put it that way. I believed that it was important to have the financial advice of Morgan Stanley because we had a high regard for their competence in the financial field. But I also believed that given their historic relationship with both companies, it was prudent for the du Pont Company to get financial advice from another financial house of equal competence who had had no prior ties with either company. And that is exactly what we did.

Q. Now, did you have any occasion to believe that Morgan Stanley might be influenced in giving its recommendation as to the terms that Morgan Stanley would be influenced by the stockholdings of the board of directors in Christiana?

A. Not at all. I think that I was sensitive to their difficulty in trying to come up with an opinion that would be fair to two clients both of whom had had relationships with them over the past. And I think that we had confidence that

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they were people of integrity who would express their views in the most honest way they could, and we wanted their views because of their prior history with us. Nevertheless, we also wanted a check against that from a good financial house that had no prior contact with us or with Christiana just to be sure that we had the best advice that we could before we made our decisions.

Q. Assuming that Morgan Stanley had made a report recommending that the merger take place on the basis of a discount of 10 percent from the net asset value of Christiana, would that have altered your view toward any future dealings with Morgan Stanley?

A. I don't think so. It would seem to me that when you hire an expert you want his best informed, honest

judgment, and you don't impose sanctions on him if he doesn't tell you what you don't want to hear. Let me say it the other way: If he tells you something you don't want to hear. Only a fool would treat an expert that way.

Q. Going back to your testimony of about an hour ago, I believe you described the letter that came in from Mr. du Pont as the kick-off of the negotiations? That is on Applicants' Joint Exhibit No. 2?

A. That was the kick-off of the work that began. As a result of that letter, our executive committee designated a negotiation committee and I organized a staff to do the

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necessary work to let us be informed on whether we should go forward to a final agreement or not.

Q. Now, do you know of any negotiations orally that took place before that letter was received?

A. I do not. I suspect there were none.

I assume you mean in the time period here, April 20, 1972.

Q. Yes. The letter was dated April the 20th, 1972.

A. Yes. All I am saying, Mr. Collins, that I am sure there must have been discussions back in 1961 when the Government had suggested the merger. I didn't mean to encompass that.

Q. No, sir.

A. All right.

Q. I am speaking of, say, within the preceding two to three months before April the 20th, 1972.

A. I know of none.

Q. Now, when you were first advised of the receipt of this letter, April the 20th, 1972—when you were first advised of that letter, did you have any opinion yourself as to what terms the merger would take place on?

A. No, not in that sense. The question of a merger was not fresh to my mind, but I hadn't focused at that point on what I thought were good terms, and certainly we didn't have financial guidance at that time.

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Q. How were the negotiating committee of du Pont selected?

A. As I indicated, the committee was appointed by the executive committee. I think, as I remember the meeting, Mr. McCoy advised the committee of the letter from Mr. du Pont and recommended that it was worth consideration and suggested that a committee composed of himself and myself be designated for the purpose of carrying on the negotiations. And the committee so acted.

Q. Now, on the present board of du Pont there are I believe two members who would be considered outside directors?

A. Yes.

Q. By outside——

A. Yes, I understand you.

Q. All right. Now, was any consideration given to putting those outside directors on the negotiating committee?

A. I don't know. The suggestion was made by Mr. McCoy that he and I be the negotiating committee, and that is how the executive committee responded. It seemed to me a perfectly sensible use of manpower in terms of my background and in terms of his responsibility as president of the company.

Q. Do I understand you to state that you understand these outside directors were not considered?

A. I said I don't know what was in Mr. McCoy's mind.

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Q. Now, did the board on the receipt of this letter—did it consider the possibility of having the du Pont Company merge into the Christiana Company?

A. No. Not that there was any objection to it, I suspect, if it had been raised. It simply wasn't proposed as a convenient form for conducting the transaction.

Q. Now, in the course of time, the du Pont Company has acquired treasury stock. Is that correct, sir?

A. Some, yes.

Q. Now, will you tell me the procedure that the du Pont Company follows when it acquires treasury stock?

A. Well, the treasury stock that we have at present, as I understand the situation, was purchased in the open market in connection with contingent liabilities under the Endo acquisition. It turned out that the liability did not come to fruition, and so the stock was unnecessary for use.

Q. What is the procedure followed in acquiring the treasury stock? Does the board of directors set a price at which it will acquire it, or does it leave that in the discretion of the brokers?

A. It was left—well, I will have to speculate, because I am not really familiar with the details. But I suspect it was under the direction of the treasurer of the company.

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Mr. Collins: It states September the 30th, 1972.

Mr. Gribbon: If Your Honor please, I might cut this short. Mr. McCoy will be a witness and will be prepared to explain all of the circumstances surrounding this substantial disposition of 40 shares.

Judge Ullman: Mr. Collins, you may proceed.

Would you happen to know, Mr. Shapiro, how he disposed of his 40 shares?

The Witness: I do not know, Your Honor.

By Mr. Collins:

Q. Mr. Shapiro, the report of The First Boston Company, among other things, stated that in this merger the du Pont Company should not seek any other advantage other than necessary to obtain stockholder approval to this merger. Do you agree with that?

A. As I have said, I think the great advantage to the

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du Pont Company is the dispersal of a block of 28 percent. The other items are fringe benefits that are also important and nice to have, but the crucial advantage is the dispersal of the block.

I read what First Boston said, I have my own views of what is important for du Pont.

Q. Well, now, I believe you testified earlier that it would be very difficult to put a dollar value on that aspect of it.

A. That's right. I don't know how to put dollars on that kind of a consideration.

Q. Now, translating into my own words your opinion on that aspect, are you stating that it is simply beyond the minds of many of the employees of du Pont to understand that factor?

A. No, I don't want to be misunderstood that way.

What I am saying is that to the man working in a plant who has no experience with corporate management, talk about dispersal of a block of stock is not going to be as meaningful as it will be to people who are experienced in this area. And a man like that will pay, I think, greater

attention to dollars than he will to what in my view is the more important consideration.

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Q. During your earlier testimony I believe that you stated that the Christiana Company had contributed greatly to the success of the du Pont Company over a period of years.

A. I said that the men who ran the Christiana Company had been the builders of the du Pont Company. And I named them by name.

Q. Yes, sir. But did you state that the Christiana Company had contributed to the success?

A. I don't think I did. And I didn't mean to in that sense. I think Christiana holding a block of stock in that period was a contribution, but my point of emphasis was the contribution made by the men.

Q. You stated that in your view, that the Christiana Company does not have to have a merger at the present time.

A. I think it is a matter of their free choice. That is true for both sides.

Q. Now, when you say that they do not have to have a merger, are you speaking in a legal sense or are you speaking in an economic sense?

A. I am speaking in a practical sense.

They are free to make their own choices. There isn't any order that forces them out of existence such as you had under the Public Utility Company Act. This is a free

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business situation. They can make whatever judgments suit their best interests.

Q. Now, you are speaking, then, in a practical sense.

A. Yes, sir.

Q. Now, did I understand you to state that since the General Motors divestiture, at which time the Department of Justice suggested a merger, that Christiana had declined to merge and it incurred taxes in the millions of dollars?

A. That is right. I said they incurred taxes in the range of 75 to 100 million dollars on the GM divestiture, and they gave up the opportunity to escape the intercorporate dividend tax and th costs of running their operation, and also to get du Pont shares held directly.

Q. With the Federal income taxes being a fact, do you state that in a practical sense that Christiana is under no pressure to merge?

A. I state that without qualification. They have lived with the tax that they pay for the life of the tax and it doesn't seem to have bothered them at all.

Q. But people can live with a burden, but the burden is still a pressure, wouldn't you say?

A. All I can do is speculate on what goes into their thinking, and they seem not to have regarded it as much of a burden. Otherwise, I would have thought they would have made the move back in 1961 and saved a fortune in tax dollars.

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CROSS-EXAMINATION (Resumed).

By Mr. Murtaugh:

Q. Calling your attention to page 2 of Murtaugh's Exhibit No. 4, I direct your attention to the table, the first table on page 2. I see listed there 69,216 shares of Wilmington Trust Company common. Do you see that?

A. I do.

Q. A carrying value of $903,592. And what is described as a market value of $2,837,856, approximately a little over three times the carrying value. You note that, do you?

A. I note that.

Q. Yes. You will note the asterisk right after that—double asterisk, I should say, right after that last figure. Would you read what the asterisk says, please?

A. The double asterisk reads as follows: "Based on closing bid price in local OTC market—but that may not be the realizable value of such a large block of stock."

Q. Now, the holdings of Christiana in the Wilmington Trust Company constituted about, according to information here or elsewhere, 3.45 percent of the outstanding shares. Do you recall that circumstance?

A. I have heard the number mentioned.

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Q. Despite the fact that this was stated to be a large block of stock, it was thought wise to state that such value might not be realizable. Is that correct?

A. I think it was thought wise—it was thought prudent to save the point until the matter could be investigated.

Q. It was the intention in this merger to sell the shares of Wilmington Trust Company.

A. That's right.

Q. The asterisk called attention to the fact that market value unless properly understood might be a misnomer. Is that correct?

A. I don't read it that way.

Q. How do you read it?

A. I read it just as the words were quoted, as saying that the calculation was based on the closing bid price in the local over-the-counter market. But the author was

saving the question whether that much could be realized if all the shares were sold at one time on a given day.

Q. Do you think it is—if you were able to sell it over a period of a month or two at that price that it would be pretty good execution?

A. I don't know. This is a question I would put to financial advisors, and I think that is all the author had in mind when he saved the point.

Q. Now, I have taken the definition of "market value"

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from Webster's New Unabridged International Dictionary, Second Edition.

Econ—that stands for economy, I presume. The price which a man can expect to receive; the average value of a commodity in a given market during a short period of time, as distinct from normal value, which can be found only by observing very long periods.

Do you have any quarrel with that?

A. I have no view of it at all. That is what the dictionary says.

Q. The same dictionary defines market price. The abbreviations right after that for it are econ. and com., which I take it mean a term used in economics and commerce. The definition is as follows: The price actually given in current market dealings; the price at which the supply and demand are equal. Do you accept that definition?

A. It sounds sensible to me as a general premise.

Q. Does the asterisk reflect the fact that the so-called market value is merely the quoted value of a relatively small amount of normal sales at a particular time?

A. The asterisk denotes the fact that the number, namely $2,837,856 is based on a closing bid price in the local over-the-counter market, period.

Q. Now going up the table to the 13,417,120 shares of du Pont common stock, where the carrying value is said to be

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$74,621,915 and the market value is stated as $2,222,210,-500. There is an asterisk there too, isn't there?

A. Yes, there is.

Q. Could you read what that says?

A. It reads as follows: "Based on NYSE closing prices —but this may not be the realizable value of such a large block of stock."

Q. Except for the reference to the New York Stock Exchange and the over-the-counter markets, the same——

A. It is the same concept.

Q. Same concept, yes.

Do you believe that statement is true, that that wouldn't be the realizable value of that?

A. Which statement?

Q. $2,222,210,500.

A. I would have a very firm guess that if anybody tried to market 13,417,000 shares of du Pont on a cash sale on one day, that number would not be realizable. You would have blockage effects.

Q. What is the significance—on any particular day, let's say the average sales of du Pont might be 6,000, 7,000 shares. Isn't that roughly speaking true?

A. It ranges from 50,000 to 90,000 shares a week, depending on circumstances.

Q. How do you justify relating any value in this case

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to the quotation for individual shares traded in relatively small amounts with reference to the 13 million shares?

How do you justify taking that as a valuable concept in this context?

A. I don't. I haven't attempted to.

Q. I am referring——

A. I have asked financial analysts to give me their best advice as to how to value these assets and they have done that.

Q. This was before you had the benefit of the financial analysts.

A. That's right. This document was prepared by Mr. Grimes simply as a quick summary of relevant facts that would inform management people in du Pont of the nature of this kind of a transaction. I have no quarrel with it even though I didn't see it until after it had be issued.

Q. Well, now, carrying down to the next table on page 2, we see the same figures more or less summed up and added to with an additional—I guess the only difference is they added the cash and the federal tax claim to the sums above. Is that correct?

A. On a quick reading, that is what it looks like.

Q. Now, the asterisk has disappeared, hasn't it, now, and the thought that this may not be realizable?

A. There is not an asterisk on those numbers. You

[749]

are correct.

Q. And more or less continuously on through the papers that this is restated in, that matter is not called to the attention again that this is not a realizable value, such a large block of stock, is it, to the best of your knowledge?

A. The paper speaks for itself. Whatever it says it says.

Q. Is it an attempt to substitute a concept of value here by the use of phrases like market value when it couldn't possibly be marketed at that value?

A. The paper says that if you calculate 13,417,120 du Pont common shares by the market value at May 1, '72, that is the quoted price in the market, you will get this kind of a sum. I do not read it as saying that anybody can realize that amount of dollars in cash by selling the shares at that price. I have difficulty believing anybody in our organization who read this was confused by what it says.

Q. In the notes to financial statements—I am now looking at something called C-19, Notes to Financial Statements, Christiana Securities Company.

Mr. Gribbon: That is the proxy statement, du Pont Exhibit 5. Do you have that?

Mr. Murtaugh: You will have to help me out.

[750]

The Witness: I don't think I do.

Mr. Gribbon: Go ahead, he can follow.

By Mr. Murtaugh:

Q. The accountant who I suppose is professionally more exact, in referring to the total of the net asset value of Christiana—of the du Pont shares owned by Christiana, in place of the heading "Market Value" puts shares owned times price per share.

A. Yes, I see that.

Q. And the second paragraph down from that table he puts the amounts computed as above are not represented to be the aggregate quoted market or realizable values of the respective investments. Do you see that?

A. I do.

Q. Do you think that—you don't believe that there is sort of a thought transference here involved in the continual reference to market value with reference to what is

merely the sum of the current quoted price times the number of shares outstanding?

A. What I believe is that the document that Mr. Grimes prepared said to our management people if you calculate the number of du Pont shares that Christiana owns times the price in the stock market on May 1, 1972, you will get the number $2,222,210,500, and there is a footnote that says don't be sure this is the right number because it may not be realizable.

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Q. Correct.

A. I don't think there is any ambiguity at all about it.

Q. You have no question but it is not realizable, do you?

A. In my judgment, as an amateur financial man, it is not realizable if you take all the shares to market on one day.

Q. Now, why do you think, then, that we should—especially—you are familiar with, of course, the market price was ticking at 146 I believe for Christiana the day of the announcement, and the other was 164 for du Pont.

Do you have any idea why the market value wasn't assigned to Christiana shares in this table?

A. I do not.

Q. It says on page 3 the trading volume in both issues, namely the common and preferred, of Christiana is quite limited.

You have heard testimony here by witnesses adduced by the applicants for exemption that the market price of Christiana is—compared to similar securities fully represented its value comparably. You heard that evidence?

A. I heard testimony. I won't quarrel with your characterization.

Q. Going down——

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A. I didn't think that the words said what you quoted, however.

Q. Which is that?

A. The words I am reading say that Christiana stock is traded in the national over-the-counter market. The preferred shares are traded in the local over-the-counter market.

Q. The trading volume in both issues is quite limited.

A. That's right. Nothing about du Pont, though.

Q. No, no.

A. I misunderstood you. I thought you mentioned du Pont.

Q. Maybe I misspoke myself. I meant Christiana.

So that the price of 146 on the date selected, of the announcement, represented a fair comparable price for Christiana shares as against other similar shares according to the testimony, 146.

A. I have no way of responding to that.

Q. Well, you have heard——

A. That is your summary of the testimony. I am willing to accept it for this purpose.

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Q. Thank you. Now, going down this sheet we see a paragraph called "Possible Advantages and Disadvantages of a Merger." It seems like quite a familiar list of advantages and disadvantages showing that the matter had been pretty thoroughly gone into by the Treasury Department. Wouldn't you say?

A. I think it is a list of advantages and disadvantages that Mr. Grimes and his associates compiled and recorded in this document. I haven't any idea how thoroughly they worked at it.

Q. You do agree, don't you, that substantially that list appears in your financial advisors' thing in one form or another because those were the advantages or disadvantages I presume.

A. I would assume that any fair-minded appraiser of the situation would have come out with the same list.

Q. Now going down to the next paragraph, Paragraph 4, we—no, it is under B.

A. I am lost, Mr. Murtaugh. What page are you on?

Q. Page 4. It is not Paragraph 4. Page 4, the last full paragraph at the bottom. "As an alternative to merger?"

A. I see it.

Q. Now Mr. Grimes or whoever prepared it, people in his department, evidently had made an investigation and

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come up with at least a preliminary conclusion as to the fact that Christiana had this alternative. Isn't that correct?

A. This document refers to the possibility of a 333 liquidation as one of the alternatives that might be available to Christiana. That is correct.

Q. Now, speaking generally in the legal context, if you have a collision between two automobiles, Driver A and B, and B is clearly at fault but all he has is, say, a $10,000 insurance policy, the damages are much greater than that. Now, as a practical matter, A better settle for the 10 or maybe a slight discount from it. Isn't that good advice?

A. I have never practiced that kind of law. I wouldn't presume to know.

Q. Well, suppose you were—it doesn't sound like a sensible thing to do?

A. I will tell you about a case in Delaware just two weeks ago where it worked out differently. I don't——

Judge Ullman: Suppose we concede that if the driver at fault is totally insolvent with no hope of ever obtaining any assets it would be good advice.

Please proceed.

Mr. Murtaugh: Yes, right.

By Mr. Murtaugh:

Q. Now, if Christiana had an opportunity to effect a tax-free distribution, or a relatively inexpensive

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distribution of its shares to its shareholders by a liquidation, you wouldn't expect them to give any special extra benefit to du Pont, would you? To effect the same result?

A. I would think that a prudent management would take the course of action that was least expensive to them in accomplishing their objective.

Q. Right. And so that in looking at the merger, that conditioned the amount that Christiana directors could prudently take in view of their duties to their own shareholders, is that correct?

A. No, I don't think so. I think at this stage of the game the 333 liquidation concept was a subject for investigation. Until it had been investigated I would assume it didn't condition anything.

Q. Now, on that line, now looking at the Department's Exhibit 1. Is that the correct designation?

Mr. Anderson: Division Exhibit 1.

Mr. Murtaugh: Division. Division Exhibit 1.

By Mr. Murtaugh:

Q. Which is an instruction—well, no. It is a letter to Morgan Stanley Co. dated June 6, 1972, to which is attached a memorandum dated June 6, 1972, entitled "Factors to be Considered in Report of Investment Bankers." Have you ever seen this instrument before?

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A. I certainly have. I signed the letter.

Q. Okay. Yes. That is right.

Now, this immediately preceding answer is that this matter by Mr. Grimes was just thrown in the hopper for consideration or the best information he could get at the time. But this memorandum seems to be rather categorical, and it is signed by you, or sponsored by you at least in transmitting it. Is that correct?

A. No.

Q. No?

A. I don't think there is anything categorical about it at all. The memorandum is simply a document entitled "Factors to be Considered in Report of Investment Bankers," and it is signed, as I remember it, by Covington and Burling.

Q. You, however, read it before you transmitted it, I presume.

A. I would expect so. I don't remember the time sequence, but I would certainly abide by the memorandum.

Q. Now, if we can go through this document, the factors to be considered. You say—it says in passing on merger terms—on page 1—affecting common stock, the Commission has looked to such factors as comparative earnings, dividends, market value, and net asset value, including adjustments for potential taxes arising from unrealized capital gains in portfolios securities and the tax benefits

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resulting from tax loss carry-forward.

It is also down below, the last sentence, in dealing with merger terms where preferred stock, the Commission has taken into account dividend and redemption terms, asset value, asset value coverage, and dividend coverage.

A. You skipped the one sentence in that paragraph that said "No single factor has been considered determinative."

Q. Okay, fine. Thank you.

Now, on this earnings and dividends paragraph on page 2, it is pointed out that there will be elimination of a discount of 7.2 percent which the inter-corporate tax wiped out of the dividends. Is that correct? Tax on dividends received?

A. It says the principal factor affecting Christiana earnings is the corporate income tax at an effective rate of approximately 7.2 percent.

Q. Then the next sentence says consideration should be given to the value to Christiana shareholders of the elimination of this tax.

What consideration was given to that in your deliberations?

A. You are moving now from this document to our negotiations?

Q. Well——

A. This is a document that was given to the investment

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banking people to give them assistance in coming to their judgments.

Q. Yes.

A. We worked from the recommendations we had from the investment bankers.

Q. I see.

A. Not from this document.

Q. Now, the next paragraph deals with market values, and it points out that Christiana common stock had sold at a substantial discount from the net asset value on a market price basis of the underlying du Pont stock. This discount has recently been in excess of 20 percent. It refers to the fact that it has narrowed since the merger.

Now, the next paragraph says from du Pont's point of view, the most favorable terms of a merger would be those that approach the full amount of the discount. That means treated at $146, if du Pont was worth 164. That was determined on the date the merger was announced. Is that roughly speaking what that would mean?

A. I think that is what counsel said.

Q. Yes. All right. However, in the Delaware Realty case, the SEC accepted as a basis for merger terms values based on underlying net asset values. The rationale for this was that the parties to the merger had alternative means of recognizing net asset value without significant tax

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effect.

We understand Christiana would be prepared to take the same position here. And then it goes and refers to the 30-day Section 333 liquidation.

Now, then the next paragraph says the report should indicate whether on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value in the merger negotiations. Do you feel that this is flagging the investment advisors that they are controlled by the practical concept that if Christiana can accomplish achieving the market value of its quoted shares

one way, they better work within the range that is left to accomplish a merger?

A. No. Maybe I can shorten things a little bit here by reminding you that it was we who challenged the 333 calculations and led to counsel for Christiana's withdrawing that as a consideration in these negotiations.

Q. That was pretty late in the day, though, wasn't it?

A. It was before the terms were negotiated.

Q. Suppose it hadn't been withdrawn. What would have been the result?

A. It was withdrawn.

Q. It couldn't be any worse for du Pont if it hadn't been withdrawn. Could it?

A. All I am saying, Mr. Murtaugh, is that we examined

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the concept, we did our homework, we found holes in the theory, counsel for Christiana withdrew the concept. And it was no longer in the negotiations.

Q. You may believe that Mr. Grimes and counsel for Christiana and so on were proceeding in good faith up to the time we will say June 30 was the time that it first was seriously challenged, isn't that right?

A. It was challenged—well, let me say it a different way.

Questions were raised by tax counsel before the parties met to negotiate. On the weekend before the first negotiating session on July 3 it was evident that the numbers would not withstand serious analysis simply because there were unresolved legal issues. When the parties met on July 3 to negotiate, the first item on the agenda was raised by me, it was what counsel for Christiana regarded as the current status of 333. He conceded that he would withdraw that as a consideration. And we went on from there.

Q. By that time the drafts of the financial houses were in hand, weren't they?

A. Yes. Yes, they had been delivered on June 30th.

Q. And they were all based on the assumption of the 333 liquidation, weren't they?

A. You are two-thirds right. First Boston paid no attention to 333, as I remember it.

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Q. They got one of these memorandums too, did they?

A. Yes, sir.

Q. They didn't refer in their—well, you said they paid no attention to it.

A. I think Mr. Townsend testified to that fact here last week.

Q. Do you think that was because he didn't prepare a very thorough report or because he didn't think it was significant?

A. I think that Mr. Townsend prepared a fine report, to the credit of his firm. It was persuasive to us.

Q. He is the only one that didn't think even to flag the market impact. Is that right?

A. He didn't think enough of it to want to write about it. He discussed it with us.

Q. Now we have another value concept. I am now looking at page 37 of the first proxy. I think it was Filing No. 2—I mean I think it was filed with the proxy amendment to the second application.

Judge Ullman: Off the record.

(Discussion off the record.)

Judge Ullman: On the record. Mr. Murtaugh is referring to page 37 of Amendment No. 2 to the application.

Please proceed, Mr. Murtaugh.

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By Mr. Murtaugh:

Q. This whole amendment virtually is related to a proxy statement that apparently the staff requested be prepared to go along with the application for exemption.

Under rights of Christiana stockholders objecting to the merger, the following appears: Any holder of Christiana preferred stock or common stock who objects to the proposed merger may elect to be paid the value of such stock exclusive of any element of value arising from the expectation or accomplishment of the merger providing he complies with certain requirements. Now, that is another value that is involved. I realize that in the evolution of things there has been a change in that, but it calls attention to the fact that without the merger—without the expectation or accomplishment of the merger we would have a very different set of values for the shareholders of Christiana shares. Is that correct?

A. The passage you referred to quotes the meaning of Delaware law, Section 262, involving the rights of objecting stockholders.

Q. Okay. And they are supposed to get the value, aren't they? If they dissent?

A. They are supposed to get whatever the law says they get. I take it the law means here that they get what they had prior to this transaction.

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Q. Now, on page 4 of Division's Exhibit 1, that same concept is referred to in the first full paragraph.

Do you see that?

A. Yes, I see the quote, the paragraph.

Q. And the investment—we have a sort of a—I don't know if you have the interlined copy that I have here

now that has the notes of Morgan Stanley, I guess. Is that the evidence?

Mr. Gribbon: That came from the files of Morgan Stanley.

By Mr. Murtaugh:

Q. Yes. It says no weight. Have you got that?

A. I have got the same one, yes.

Q. The next paragraph I consider quite important. The distribution of du Pont stock to the shareholders of Christiana may provide an incentive for such shareholders to dispose of their holdings. While affiliates of Christiana may be restricted in the amount and method of du Pont stock, a substantial portion of such stock will be freely marketable. Christiana is also considering whether its affiliates may seek registration rights for an underwritten public offering following the merger. The possibility that these factors may have a depressant effect on the market price of du Pont common stock should be considered.

Now, tell us what was said about that in any—did

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you have a discussion based on this with your two advisors?

A. The advisors got this document and in the course of their work, as they have testified, they inquired into the question of what the probabilities were that shares would move to market. Based on the information they got they arrived at the conclusions reflected in their records.

Q. The conclusion of Morgan Stanley as I recall was that the tax impact would be so great that that was enough for them to pass it over as not worth further consideration. Isn't that right?

A. I don't think that is a fair characterization of Mr. Townsend's testimony.

Q. Very well.

And the conclusion of Kidder, Peabody was that based on their asking counsel for Christiana information, that he said he knew of no sales, that they hadn't taken that into account. Isn't thai correct?

A. I don't agree with that appraisal either.

Q. Okay. In the very start of your discussion with the financial advisors did you put before them the concept of net asset value as something that was what they call a benchmark or a thing to work from rather than market value?

A. Mr. Murtaugh, I assume when you say your discussion, you mean the du Pont people, not me personally?

Q. Well, either one.

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A. Because I don't think I had discussions with financial advisors except in one instance.

Q. When did you have that?

A. And that was with First Boston shortly after they were retained. They came to Wilmington one day simply to get acquainted and run through the various issues that had to be considered. But I have lost my train of thought. Now perhaps you can restate the question.

Judge Ullman: You were speaking of discussions with financial advisors. Mr. Murtaugh was inquiring about the discussions which du Pont then I suppose had.

By Mr. Murtaugh:

Q. The net asset value concept.

A. Yes.

My recollection of the events is that the financial advisors were supplied with legal memoranda by counsel on both sides summarizing all the SEC and court decisions in this area, and some of them dealt with net asset value, some dealt with other considerations.

Q. And none of them turned their back on net asset value, did they?

A. Not in an investment company situation so far as I remember it.

Q. Thank you.

Now, on this next paragraph—the last paragraph

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on page 5, to the financial advisors, there is a reference to a possible premium because the Christiana block of du Pont shares was a controlling block. That concept was not highly regarded by Morgan Stanley as you recall. They didn't—

A. Yes, I think that is right. Kidder, Peabody espoused it; Morgan Stanley did not.

Q. Yes.

Now, in the General Motors case, the original antitrust Clayton Act case, you came into that case more or less from the first hearing, isn't that—

A. That is correct.

Q. Eventually, after Judge LaBuy found in favor of defendants, the Supreme Court chose to reverse that because of, oh, the relationship between du Pont and General Motors presented a picture in which there might be abuses although there was nothing in the record to prove any. Isn't that rough—

A. That is a rough and ready description of what happened.

Q. Yes.

A. I can state it more precisely. But I am not sure it makes any difference here.

Q. Yes. Well, the one thing that they seemed to fasten onto as being important was—that was concrete was that one of your departments, one of your present

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departments, I think fabrics and finishes or something, General Motors might get $65 or $70 million worth of business by reason of their connection that the purchasing department of GM might have put elsewhere. Do you recall that being a sort of a concrete example without proving that du Pont did get it, but that——

A. I think that is a gross misstatement of what the court said.

Q. Well, we can look at the opinion. Do you want to restate—what was the—how much money was the prospect that General Motors could get out of this?

A. If we are going to take the time to go back for that old history—if you think it is relevant I will be glad to give you a quick summary.

Q. Listen. I will shorten it up. My sense of my questioning is there was no remote suggestion, was there, that General Motors was going to make a profit of a half billion dollars out of all the conceivable dealings it could have with General Motors over a long period of time?

A. I don't understand the question.

Mr. Murtaugh: Repeat the question, please.

(The question was read back.)

The Witness: I still don't understand it.

By Mr. Murtaugh:

Q. That du Pont was going to make a half billion

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dollars. In other words, the profit element in the case was —it didn't approach the profit element in this transaction.

A. The profit element wasn't in the case. The Supreme Court, Judge LaBuy had no issue before them that dealt with profits.

Mr. Gribbon: Your Honor, I submit it is rather fruitless to pursue on cross-examination what the Supreme Court did or did not say. The opinion is there. I would suggest that Mr. Murtaugh proceed with appropriate cross-examination.

Mr. Murtaugh: Okay. I will proceed.

By Mr. Murtaugh:

Q. Now, you mentioned in some of your testimony that you and Mr. McCoy sort of speculated on a somewhat higher price than actually developed here before the ballots came in from the advisors and so on.

A. No, I don't think I said that. I thought I said we were interested in a higher price than Kidder, Peabody or Morgan Stanley had recommended.

Q. You formed some opinion before you got the report from anybody, hadn't you?

A. No.

Q. Sort of a——

A. No. This was an opinion we formed on the weekend——

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on the Fourth of July weekend.

Q. Now, being only human, when you and Mr. McCoy were appointed a special committee, didn't you sometimes think either separately or together what the ratio might be?

A. Yes, indeed.

Q. Give me what your first speculation between each other was.

A. We didn't go at it that way. I did what homework I could quickly, and I discovered that the ratio of the Delaware-Christiana merger had been 1½ percent. I discovered that in the most recent merger that we knew about Mariner Eccles had merged his Eccles Investment Company into Utah Construction at a discount of 1.8 percent. That was the sum total of our information at that point in time.

Q. Do you think that from the point of view of arm's-length bargaining that prevented you from going beyond that sort of a concept?

A. As a practical matter we went beyond it. We went to 2½ percent after we got the financial advice.

Q. Well, 2½ percent is about—figured out to be about $1.15 or $1.20 per share benefit?

A. That is right. If you measure just the discount.

Q. Yes. And it turns out they have earnings benefits of about 4 cents a share, it seems to be sort of the consensus.

A. Yes, that is correct. If you limit yourself to just

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that consideration.

Q. Now, just compared to—have you ever figured out—I think it is figured out in the papers here someplace, the earnings benefit to Christiana from this transaction if it goes through as proposed. And I think it comes out about 40 cents as against a nickel. Would that be fair? I mean they get increased income over what they were getting?

A. The fact that they hold their du Pont shares directly gives them an advantage that they didn't have before. There isn't any question about that.

Q. More in income?

A. More in income, that is right.

Q. Yes. Did the concept of giving them an inducement to go through by giving them an extra nickel a share of income or 4 cents a share of income as being adequate inducement in view of their lower market price and the fact that du Pont has to agree—was that concept ever canvassed at all in this picture?

A. Not that I know of.

Q. And yet either party in a two-arms'-length transaction can walk away, can't they?

A. They could in a two-arms'-length transaction. They could in this transaction. And I assume they would have if they couldn't find mutually agreeable terms.

Q. Do you think that—I asked Morgan Stanley—of

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course he isn't speaking finally on the subject, but they gave it as their opinion that Christiana wouldn't stand for any greater terms. Did you hear that testimony?

A. Yes.

Q. Is that your opinion?

A. I think it was a fair estimate at the time, that given the reports of the financial advisors and given the legal considerations that were on the table, that the Christiana management would have had great difficulty in going much beyond where it wound up.

Q. And assuming that didn't take into account the benefits of the merger to both parties to any marked extent except to the extent of the 4 cents a share benefit, did you feel it would have been unethical of you to say can we have part of this benefit that we are creating by our cooperation?

A. I am not sure it is a matter of ethics. I think it is a matter of common sense. What we were looking at as business people was what benefits come to du Pont. Are there any injuries to du Pont. Once we satisfied ourselves

as to that and canvassed the views of the financial experts and the legal experts, we were satisfied with the proposition as one that was quite attractive for du Pont.

Q. Now, you haven't any—it seems to me that we have an ambiguous approach in several aspects here. One, that the shares are greatly benefited by becoming a marketable

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thing as compared to the very limited market for Christiana holders; and second, they won't be marketed. Do you follow that?

A. No, I am not with you.

Q. The du Pont shares are much more marketable than the Christiana shares, I take it.

A. Yes, indeed.

Q. And they trade at a higher figure just as it stands now.

A. That is true.

Q. I have a table here that—I see information in the file, is it 95 percent of Christiana shareholders own over 1,000 shares and 200 or—132 own over 5,000 shares.

Now, with that kind of a market—the kind of a market Christiana has, those big shareholders are pretty limited in the way they could—if they wanted to get out of their whole portfolio at the present time. Are they not?

A. If you are saying they have greater marketability with du Pont shares than they have with Christiana shares, I think that is conceded on the record by everybody who has looked at it.

Q. There is no question about that. But the question is, how do they get that benefit? It is by du Pont's cooperation.

A. Of course. Of course.